

ACADEMY BRIEFING N°22

THE RIGHT TO SEEDS IN AFRICA

**THE UNITED NATIONS DECLARATION ON THE RIGHTS
OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS
AND THE RIGHT TO SEEDS IN AFRICA**

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ACRONYMS AND ABBREVIATIONS

ABS	Access and Benefit Sharing
ACB	African Centre for Biodiversity
AfCFTA	African Continental Free Trade Area
African Model Law	African Model Legislation for the protection of the rights of local communities, farmers and breeders, and for the regulation of access to biological resources
AFSA	Alliance for Food Sovereignty in Africa
AGRA	Alliance for a Green Revolution in Africa
ARIPO	African Regional Intellectual Property Organization
AU	African Union
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organization
DSI	Digital Sequence Information
DUS	Distinctiveness, Uniformity, Stability
EAC	East African Community
ECOWAS	Economic Community of West African States
EDV	Essentially Derived Varieties
EU	European Union
FAO	Food and Agriculture Organization
GMOs	Genetically Modified Organisms
IP	Intellectual Property
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture ("Plant Treaty")

LDCs	Least Developed Countries
NGO	Non-Governmental Organization
OAPI	African Intellectual Property Organization (<i>Organisation Africaine de la Propriété Intellectuelle</i>)
OAU	Organization of African Unity
PGRFA	Plant Genetic Resources for Food and Agriculture
PVP	Plant Variety Protection
SADC	Southern African Development Community
TK	Traditional Knowledge
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDROP	United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas
UPOV	International Union for the Protection of New Varieties of Plants
USAID	United States Agency for International Development
USPTO	United States Patent and Trademark Office
VCU	Value for Cultivation and Use
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

KEY MESSAGES AND RECOMMENDATIONS

KEY MESSAGES

For over 10,000 years, peasants have freely saved, selected, exchanged and sold seeds, as well as used and reused them to produce food. Today, these customary practices remain essential to peasants' right to food, as well as to global food security and biodiversity. However, since the mid-1990s, the promotion of commercial seed systems and the strengthening of intellectual property (IP) over plant varieties and plant biotechnology at the World Trade Organization (WTO) and the International Union for the Protection of New Varieties of Plants (UPOV) have seriously undermined these customary practices and, consequently, peasant seed systems and agrobiodiversity.

To respond to these challenges, among others, the United Nations (UN) adopted in 2018 the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP). The UN Declaration enshrines peasants' right to seeds in international human rights law. According to UNDROP, states shall, inter alia, "elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with their human rights obligations as they apply to peasants" (Article 2.4). States shall also "support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity" (Article 19.6). And they shall "ensure that seed policies, plant variety protection and other IP laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants" (Article 19.8).

The implementation of UNDROP represents a unique opportunity to redress the imbalance between, on the one hand, the lack of support for peasant seed systems worldwide, including in Africa, and, on the other, the massive support for industrial seed systems. This is essential for the protection of the lives and livelihoods of hundreds of millions of peasants. It is also in the interest of all, to ensure the rights to food and food sovereignty, preserve crop biodiversity, and fight climate change.

In 2018, the great majority of African countries voted in favour of adopting UNDROP. Following these votes, and in accordance with the need to apply international instruments adopted by the UN General Assembly in good faith, and to give priority to human rights norms in international and national laws, reflected in UNDROP Articles 2.4, 15.5 and 19.8, the African Union (AU) and African states shall ensure that their regional and national laws and policies, as well as the international agreements to which they are party, do not lead to the violation but, on the contrary, to a better protection of the rights of peasants, including their right to seeds.

RECOMMENDATIONS

In accordance with UNDROP, and with the binding international treaties on which it is based, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on Biological Diversity (CBD) and its Protocols, and the International Treaty on Plant Genetic Resources for Food and Agriculture (hereafter, the Plant Treaty):

The AU and African states shall recognize the intrinsic value of peasant seed systems and the central role they play in preserving agrobiodiversity, realizing food sovereignty and responding to the challenges of climate change.

- The AU and African states shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow. They shall ensure that seeds of sufficient quality and quantity are available to peasants, at the most suitable time for planting, and at an affordable price.
- The AU and African states shall respect, protect and fulfil peasants' right to seeds, including their rights to the protection of traditional knowledge, and to equitably participate in the sharing of benefits arising from the utilization of seeds. They shall recognize peasants' ancestral and innovative practices as traditional knowledge, and acknowledge their role in the conservation, sustainable use and dynamic management of crop diversity.
- The AU and African states shall support peasant seed systems, promote the use of peasant seeds and agrobiodiversity, and guarantee the right of peasants to maintain, control, protect and develop their own seeds and traditional knowledge.
- The AU and African states shall comprehensively review their normative frameworks so that peasants' seed systems are allowed to fully operate and thrive as sustainably-managed production and conservation systems in their own rights. Meaningful consultations should be held with peasant communities with regard to the crafting of appropriate policy and regulatory systems that protect, recognise and support peasants' seed systems and peasants' right to seeds, and ensure that these play a central role in ensuring food sovereignty at the local and national levels.
- The AU and African states shall establish mechanisms to ensure the coherence of their agricultural, biodiversity, economic, social, cultural and development policies with the realization of the right to seeds.

Women and the right to seeds

- The AU and African states shall take appropriate measures to eliminate all forms of discrimination against peasant women, to promote their empowerment and full participation, and to ensure that they enjoy the right to seeds without discrimination.

Right to participation

- The AU and African states shall consult and cooperate in good faith with peasants, through their own representative institutions or bodies, before adopting and implementing international agreements that may affect their right to seeds.
- The AU and African states shall ensure the full and meaningful participation of peasants in decision-making on matters relating to seeds. They shall also respect the establishment of independent and autonomous peasant organizations, addressing the existing imbalance of representation compared with more traditional civil society or industry actors. The AU and African states shall reject interest-driven and breeder-centric support in the form of capacity building and technical advice.
- The AU and African states shall ensure that agricultural research and development integrates the needs of peasants, with their active participation. They shall invest more in research and development of neglected and underutilized crops, local varieties and seeds that respond to the needs of peasants, and they shall ensure peasants' active participation in the definition of priorities and the undertaking of research and development. These varieties shall remain in the public domain and be made freely available to peasants.

Seeds laws and policies, and intellectual property

- The AU and African states shall ensure that peasants' right to seeds, as a human right enshrined in UNDROP, prevails over private and commercial rights.
- The AU and African states shall ensure that seed policies, plant variety protection and other intellectual property (IP) laws, seed marketing laws, and variety registration and certification schemes do not infringe on peasants' right to seeds as enshrined in UNDROP.
- The AU and African states shall conduct independent and participatory human rights impact assessments of public policies and laws related to seeds, including IP laws.
- The AU and African states shall elaborate, interpret and apply international agreements and standards in a manner consistent with the right to seeds. This implies that they shall, inter alia, ensure that the negotiation, interpretation and implementation of WIPO, WTO and UPOV instruments, as well as any other international agreement governing IP, do not violate, but on the contrary facilitate the realization of the right to seeds, including peasants' unrestricted and customary right to freely save, use, exchange and sell farm-saved seeds.
- African states that are among the least developed countries (LDCs) are exempted from implementing the TRIPS Agreement until 1 July 2034, and should therefore not be pressured into implementing Article 27.3b on plant-related patents and plant variety protection (PVP).
- The AU and African states shall ensure that the bilateral, regional and multilateral trade and investment agreements to which they are party do not lead to violations of African peasants' right to seeds.

- The AU and African states shall not apply to become a party to the 1991 Act of the UPOV Convention, nor shall they implement UPOV 1991 standards of plant variety protection. Instead, they shall defend their right to use the policy space available under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to design sui generis systems of plant variety protection better suited to the agricultural and socioeconomic conditions prevailing in the region. To do so, they shall use the African Model Law and sui generis legislation developed by other countries as a baseline. In developing legislation, they shall keep in mind that IP is a policy tool and not an end in itself, and that a sui generis PVP regime must be supportive of human rights and relevant national policies on agricultural development, poverty eradication, rural development, food security, biodiversity and climate change.
- African countries that have contracted onerous UPOV 1991 obligations shall consider revoking their ratification to the extent that they depart from UNDROP and other international human rights instruments.
- The AU and African states shall address the impacts of plant-related patents on peasants' capacity to access seeds and breeding material freely to develop varieties and populations adapted to their local conditions and social needs. Regional organizations and African states shall consider incorporating an exception in their domestic patent laws allowing peasants to save, use, exchange and sell farm-saved seeds and propagating material obtained from cultivating plants covered by patents. AU and African states shall take legislative measures to ensure that private contracts cannot override farmers' right to seeds.
- The AU and African states shall protect peasants against biopiracy. This requires obtaining prior and informed consent for the use of their genetic resources and traditional knowledge, and effective modalities for the fair and equitable sharing of the benefits of such use, established on mutually agreed terms between peasants and those exploiting the natural resources.
- The AU and African states shall ensure that infringement of IP is not liable to criminal sanctions, but only to civil remedies, and burden of proof must lie with the injured party. IP is private in nature, and losses incurred by eventual infringement can be compensated through monetary payments. PVP laws shall include provisions protecting peasants in cases of innocent infringement.

Phytosanitary and biosafety laws and policies

- The AU and African states shall take all necessary measures to ensure that non-state actors – such as private individuals and organizations, transnational corporations and other business enterprises – respect and strengthen the right to seeds. They shall prevent risks arising from the development, handling, transport, use, transfer or release of genetically modified organisms (GMOs) – both transgenic and genome edited – including by protecting peasants' seed systems against the risks of GMO contamination.
- The AU and African states shall consider the impact of unnecessary, onerous and costly plant health regulations on peasants' right to seeds, while still ensuring human health and safety imperatives.

International and regional cooperation

- The AU and African states shall promote the right to seeds at the UN and in the implementation of the CBD and its Protocols, the Plant Treaty, the Paris Agreement, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and UNDROP.
- The AU and African states shall channel international development cooperation to support their efforts aimed at implementing the right to seeds. By doing so, they shall promote agrobiodiversity, support the strengthening of peasants' seed systems and ensure peasants' full participation in the transition toward sustainable, resilient and just agricultural and food systems.

1. INTRODUCTION

“The more a seed system recognizes and supports farmers as stewards of a seed system for all of humankind, the more this system fulfils people’s human rights.”

Michael Fakhri, UN Special Rapporteur on the right to food¹

The United Nations (UN) Human Rights Council adopted the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) on 28 September 2018, and the UN General Assembly adopted it on 17 December 2018.²

Several UNDROP articles describe measures that states shall take to better protect peasants’ right to seeds.³ These provisions recognize the rights to food, seeds and biological diversity, and define corresponding state obligations. They stipulate that states shall respect, protect and fulfill the right to seeds, and that they shall engage in international cooperation with the same purpose. Like other states, African states shall ensure that their laws and policies, as well as the international agreements to which they are party, do not lead to violations but, on the contrary, to a better protection of the right to seeds.

UNDROP is of utmost relevance for Africa, where 58 percent of the population – 740 million people – is rural, and where over half of the population is employed in agriculture, forestry and fishing.⁴ Peasant seed systems occupy a prominent place in African agriculture and are essential to ensure food security.⁵ Indeed, the overwhelming majority of farmers rely on peasant seeds to grow their crops. It is estimated that in some regions, 80 percent of the seeds come from peasant seed systems.⁶ African women are the primary seed savers and they play an essential role in maintaining peasant seed systems, including in the development and transmission of traditional knowledge related to agrobiodiversity. As Chidi Oguamanam reminds us, “In Africa, farmers are inherently breeders, versed in using crop

1 Michael Fakhri, [Right to food](#), Report of the Special Rapporteur on the right to food, UN doc A/HRC/46/33 (2020), 578.

2 [UN Declaration on the Rights of Peasants and Other People Working in Rural Areas](#), UN doc A/RES/73/165 (2018).

3 The term “seed” is used broadly to refer to any plant structure (seeds, seedlings, cuttings, etc.) used in the propagation of a plant.

4 FAO, [FAOSTAT database](#). Based on the most recently available data (2018).

5 [Report prepared by the Civil society group to the Secretariat of the Governing Body of the Treaty](#), for the regional training workshop in Africa organized by the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), from July 29 to August 1, 2019, Dakar, Senegal.

6 Mohamed Coulibaly and Robert Ali Brac de la Perrière, [A dysfunctional plant variety protection system: Ten years of UPOV implementation in francophone Africa](#) (APBEBES, 2019), 5. See, also, ETC Group, [Who will feed us?](#) (2017); and AFSA and GRAIN, [“The real seed producers,”](#) (2018).

diversity to adapt to complex ecological dynamics, including climate change for example, even though their method of breeding does not conform to the formal scientific test tube agricultural model.”⁷

Examining how to implement UNDROP is especially timely given the IP Protocol under negotiation at the African Continental Free Trade Area (AfCFTA).⁸ Africa’s IP regime is characterized by “an array of partially overlapping and sometimes conflicting agreements, laws, policies and subregional organizations,” and the AfCFTA IP Protocol aims to resolve the incoherence and inconsistency of IP regimes on the continent.⁹ This provides a unique opportunity to implement international obligations related to peasants’ rights, and to local and indigenous community rights over biological resources – including the rights and the states’ correlative obligations – enshrined in UNDROP.

In line with UNDROP, we adopt the term “peasant” throughout this briefing. UNDROP is a legal benchmark for its recognition of peasants and rural constituencies as holders of individual and collective rights.¹⁰ Article 1 of the Declaration defines a peasant as “any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land.” The adoption of the term in the Declaration is the culmination of a process of social and political mobilization through which a historically discriminated group reclaimed a pejorative term and imbued it with new, positive meanings.¹¹ Peasants are small-scale food producers, but also local experts on food and the environment, guardians of agrobiodiversity, active participants in public policy debates, proponents of alternatives to industrial agriculture and activists in transnational networks.

“Peasant seed systems” refer to the practices, knowledge, innovations and rules developed by peasant communities to access, produce, disseminate and manage their seeds.¹² These systems are based on the collective and customary rights of farming communities and indigenous peoples.¹³ In these systems, peasants main-

7 Chidi Oguamanam, [“Plant breeders’ rights, farmers’ rights and food security: Africa’s failure of resolve and India’s wobbly leadership,”](#) *The Indian Journal of Law and Technology* 14 (2018), 251.

8 The AfCFTA brings together 54 of the AU’s 55 members (that is, all except Eritrea).

9 Titilayo Adebola, [“Mapping Africa’s complex regimes: Towards an African centred AfCFTA intellectual property protocol,”](#) *African Journal of International Economic Law* 1 (2020): 232-90.

10 Priscilla Claeys, *Human rights and the food sovereignty movement: Reclaiming control* (Routledge, 2015).

11 Marc Edelman, [What is a peasant? What are peasantries? A briefing paper on issues of definition](#) (CUNY Graduate Centre, 2013).

12 AFSA, [Proposed legal framework for the recognition and promotion of farmer managed seed systems \(FMSS\) and the protection of biodiversity](#) (2022), 6.

13 FIAN, [Time for human rights-based seed policies](#) (2022), 3-4.

tain local varieties for their own consumption and production, and they multiply and exchange seeds among neighbours and at local markets on an in-kind or cash basis. UNDROP recognizes the importance of peasant seed systems, and provides that “States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity”.¹⁴ In this briefing, in line with UNDROP, the expression peasant seed systems is used to refer to what is also known as “farmer-managed seed systems” in some countries.

This briefing focuses on the steps that the African Union (AU) and African states shall take to better protect the right to seeds. We open with an overview of the right to seeds and intellectual property (IP) in international law prior to UNDROP’s adoption, and explain their inherent tensions (Part 2). We then introduce UNDROP, outline its definition of the right to seeds and states’ obligations, and explain why international human rights instruments, including UNDROP, shall prevail over other international instruments, including those governing IP, as well as over national and regional laws and policies (Part 3). In the following section, we present the challenges to the protection of the right to seeds in Africa (Part 4). We conclude by developing proposals and making recommendations to better protect the right to seeds in the AU and African states based on states’ obligations as defined in UNDROP (Part 5).

¹⁴ UNDROP, Art. 19.6.

2. THE RIGHT TO SEEDS AND INTELLECTUAL PROPERTY IN INTERNATIONAL LAW (BEFORE 2018)

International law offers both challenges and opportunities for the protection of the right to seeds.¹⁵ This section begins with a brief history of the right to seeds and IP in international law before 2018 (Sections A and B). We then explain the conflicts inherent to these two categories of rights, and shows how UNDROP provides avenues for resolving these contradictions (Section C).

A. THE RIGHT TO SEEDS

For over 10,000 years, peasants have freely saved, selected, exchanged and sold seeds, as well as used and reused them to produce food.¹⁶ At the end of the twentieth and at the start of the twenty-first century, states affirmed these customary rights by adopting the Convention on Biological Diversity (CBD) and its Protocols, the International Treaty on Plant Genetic Resources for Food and Agriculture (hereafter, Plant Treaty) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The CBD was adopted in 1992 and has since achieved almost universal acceptance, boasting 196 states parties.¹⁷ The CBD protects important elements of peasants’ right to seeds, through provisions aimed at ensuring the protection of indigenous and local communities’ traditional knowledge and practices, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to these resources.¹⁸ In the Cartagena Protocol on Biosafety, adopted in 2000 and to which more than 170 states are parties, states also agreed to take steps to protect biological diversity, and indigenous and local communities from the potential risks posed by genetically modified organisms (GMOs).¹⁹ Finally,

¹⁵ See, also, Christophe Golay, *The right to seeds and intellectual property rights* (Geneva Academy, 2020); and Adriana Bessa and Katyussa Veiga, *The right to seeds and food systems* (Geneva Academy, 2020).

¹⁶ Regine Andersen, *The history of farmers’ rights: A guide to central documents and literature* (Fridtjof Nansen Institute, 2005).

¹⁷ [List of States Parties to the Convention on Biological Diversity \(CBD\)](#).

¹⁸ On the protection of the rights of indigenous and local communities, see [CBD](#), Art. 8j.

¹⁹ See in particular, [Cartagena Protocol](#), Art. 26.

in the Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing, adopted in 2010 and ratified by more than 120 states, states further defined benefit-sharing obligations arising from the use of traditional knowledge associated with genetic resources, and from research and development on genetic resources held by indigenous and local communities.²⁰ They also committed, “as far as possible, not to restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities.”²¹

The Plant Treaty was negotiated over a period of seven years and it was adopted by consensus at a meeting of the Food and Agriculture Organization (FAO) in 2001.²² It has more than 140 states parties²³ and is the most important international treaty for the recognition and protection of farmers’ right to seeds.

In the Preamble, states affirmed that “the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture (PGRFA), are fundamental to the realization of Farmers’ Rights, as well as to the promotion of Farmers’ Rights at national and international levels.”²⁴

In Article 9, states recognized “the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis for food and agriculture production throughout the world.”²⁵ The same article requires states parties to take measures to protect and promote farmers’ rights, including (a) the protection of traditional knowledge relevant to PGRFA; (b) the right to equitably participate in sharing benefits arising from the utilization of PGRFA, and (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA.²⁶ It is important to note that Article 9 provides that a state party will do this “as appropriate and subject to its national legislation.” But it also states that its provisions shall not be interpreted “to limit any rights that farmers have to save, use, exchange and sell farm-saved seed or propagating material.”²⁷ It is therefore clear that these provisions aim at protecting customary rights that farmers/peasants have always had.

20 See [The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization](#), Art. 5.5 and 5.2.

21 [Nagoya Protocol](#), Art. 12.4.

22 José Esquinas-Alcázar, Angela Hilmi, and Isabel López Noriega, “A brief history of the negotiations on the International Treaty on Plant Genetic Resources for Food and Agriculture,” in *Challenges in international law and governance*, eds. Michael Halewood, Isabel López Noriega, and Selim Louafi (Routledge, 2013), 135-49.

23 [List of States Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture](#).

24 [Plant Treaty](#), Preamble.

25 [Plant Treaty](#), Art. 9.1.

26 [Plant Treaty](#), Art. 9.2.

27 [Plant Treaty](#), Art. 9.3.

In adopting UNDRIP in 2007, states recognized the right to seeds in international human rights law for the first time, by recognizing indigenous peoples’ right to maintain, control, protect and develop their seeds, and their ownership of these seeds.²⁸

B. INTELLECTUAL PROPERTY

The extension of IP to plant varieties and plant biotechnology began in European countries and the United States in the twentieth century, through plant breeders’ intellectual property and patents.²⁹ This legal development was intrinsically linked to the development of a commercial breeding industry separate from farming and, more recently, of a biotechnology industry.³⁰

Another significant development was the adoption in 1994 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (WTO). The TRIPS Agreement requires WTO members to provide for a minimum term of patent protection of 20 years for all inventions in almost all fields of technology, including agricultural biotechnology, provided that they are new, involve an inventive step and are capable of industrial application.³¹ According to Article 27.3b, plants and animals can be excluded from patentability, but members of the WTO must protect IP over plant varieties either by patents, an effective sui generis system (a system of its own kind) or a combination of both.³²

Patents represent the most comprehensive form of IP protection that can be granted. They give the right-holders – in most cases corporations – exclusive rights over plants and their components. When they use a patented product or process, peasants (like breeders), as licensees of the patent holder, are normally obliged to enter contractual agreements that prohibit them from saving, resowing or exchanging the seeds they buy from the patent-holders or their licensees.³³ Switzerland has taken legislative measures to ensure that private contracts cannot override farmers’ legislative right to use farm-saved seeds, but it represents an exception worldwide.³⁴

Most countries have opted for granting IP over *plant varieties* through plant variety protection, as opposed to patents.³⁵ In doing so, some countries, such as Ethiopia,

28 [UN Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#), Un doc A/RES/61/295 (2007), Art 31.1.

29 Réseau Semences Paysannes (RSP), [Seeds and farmers’ rights: How international regulations affect farmer seeds](#) (2011), 14–9.

30 Olivier De Schutter, [Seed policies and the right to food: Enhancing agrobiodiversity and encouraging innovation](#), A/64/170 (2009), §1.

31 See [TRIPS](#), Art. 27.

32 See [TRIPS](#), Art. 27.3b.

33 De Schutter, “[Seed policies](#),” §12; RSP, “[Seeds and farmers’ rights](#),” 31.

34 [Views, experiences and best practices as an example of possible options for the national implementation of Article 9 of the International Treaty](#), Submission by ProSpecieRara to the FAO ITPGRFA (2019).

35 Some exceptions are Australia, Japan, Singapore, South Korea and the US, where plant varieties can be protected by both patents and PVP.

India, Malaysia and Thailand, have chosen to develop their own sui generis legislation to protect the right of peasants as well as plant breeders' IP.³⁶ For example, India – which is a member of the WTO and a state party to the TRIPS Agreement, but not a member of UPOV – adopted the Protection of Plant Varieties and Farmers Rights (PPVFR) Act (2001).³⁷ The PPVFR Act grants exclusive rights to plant breeders, but also guarantees farmers the right to save, use, sow, resow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (Article 39). Norway offers another interesting example, as it decided not to adopt a law in 2005 that would have reinforced the protection of breeders' rights and allowed Norway to become a party to the 1991 Act of the UPOV Convention (instead of the 1978 Act), on the grounds that it would have been detrimental to farmers' rights in the country.³⁸ In 2000, the Organization of African Unity (OAU) developed a sui generis African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (hereafter, African Model Law) to guide African countries in the development of plant variety and farmers' rights legislation (see Part 4 Section A6).³⁹

In implementing TRIPS Article 27.3b, many countries have adopted the model proposed by the International Union for the Protection of New Varieties of Plants (UPOV) and its Convention (UPOV Convention). The first version of the UPOV Convention was adopted in 1961 by six Western European countries and it entered into force in 1968. It was revised in 1972, 1978 and 1991. Since the entry into force of the 1991 Act in 1998, countries seeking to accede to UPOV have no option but to adhere to the 1991 version of the Convention.⁴⁰ UPOV significantly increased its membership in the second half of the 1990s, as countries rushed to ratify UPOV 78 before doors were closed to it. It is noteworthy that most countries in the Global South that have the option of remaining party to UPOV 78 have done so, in order to retain the flexibility necessary to protect the rights of farmers, peasants and indigenous peoples.⁴¹ On the other hand, most countries in the Global South that have adopted UPOV 91 have done so to fulfil obligations under trade agreements with the European Union (EU), the United States (US), Japan or the European Free Trade Association (EFTA).⁴²

As of 2022, more than 70 states are members of UPOV, two-thirds of which have ratified the 1991 Act.⁴³ In 2014, the African Intellectual Property Organization

36 Carlos M. Correa, *Plant variety protection in developing countries. A tool for designing a sui generis plant variety system: An alternative to UPOV 91* (APBREBES, 2015), 41-5.

37 Government of India, *Protection of Plant Varieties and Farmers' Rights Act* (2001).

38 The Farmers' Rights Project, *Best practices: Norway's "no" to stricter plant breeders' rights* (2011).

39 Organization of African Unity (OAU), *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (2000).

40 UPOV, *International Convention for the Protection of New Varieties of Plants* (as revised in 1991), Art. 37.

41 The only exceptions are Kenya and Panama. See Karine Peschard, *Searching for flexibility. Why Parties to the 1978 Act of the UPOV Convention have not acceded to the 1991 Act*, (APBREBES, 2021).

42 See, for example, Christophe Golay and Caroline Dommen, *Switzerland's foreign policy and the United Nations Declaration on the Rights of Peasants* (Geneva Academy et al., 2020).

43 See *List of UPOV Members*.

(OAPI) became the second intergovernmental organization, besides the EU, that is party to UPOV 1991.⁴⁴ However, several large agricultural producers and exporters – for example, Ethiopia, Honduras, India, Indonesia, Malaysia, Thailand and Vietnam – are not members of UPOV. Studies have shown that a country can have a dynamic plant breeding sector without being party to UPOV, and that there is no direct causal link between UPOV membership and seed imports.⁴⁵

The UPOV Convention enforces the rights of plant breeders who have developed plant varieties that are new, distinct, uniform and stable (Article 5.1). It is important to note that the novelty criterion does not mean that the plant variety was not already known or used, for instance by peasants. Rather, it means that the variety was never commercialized in the formal market, or listed in an official seed catalogue.⁴⁶ The uniformity and stability requirements exclude farmers' varieties, which are by nature heterogeneous, dynamic and constantly evolving.⁴⁷

UPOV 1991 grants breeders at least 20 years of exclusive rights over novel, distinct, uniform and stable plant varieties (Article 19). While previous versions of the UPOV Convention already prohibited peasants from selling protected seeds, the 1991 Act also prohibits them from exchanging these seeds. Peasants in a state that is Party to UPOV 1991 cannot save or reuse seeds of protected varieties, except on their own farms, and only provided that their government has adopted an optional exception to this effect (Articles 15). Moreover, this exception must be "within reasonable limits" and safeguard "the legitimate interests of the breeder." This means, for example, that it can be limited to certain crops or can be conditional on the payment of license fees.⁴⁸

Intellectual property aims at encouraging innovation by allowing the patent-holder or the breeder to be rewarded for the investment made in the development of a new plant variety, while at the same time – in the case of plant variety protection – allowing others to access the protected plant material for further breeding.⁴⁹ However, experts have argued that excessive IP protection through plant variety protection (PVP) and patents may discourage innovation instead of rewarding it.⁵⁰ For the former UN Special Rapporteur on the right to food, Olivier De Schutter,

44 See UPOV, *African Intellectual Property Organization (OAPI) becomes second intergovernmental organization to join UPOV*, Press release (2014).

45 Derek J.F. Eaton, *Trade and intellectual property rights on the agricultural seed sector*, Research Paper 20, Centre for International Environmental Studies, The Graduate Institute, Geneva (2013); *Access to Seed Index shows: Implementation of UPOV 1991 unnecessary for the development of a strong seed market*, Policy Brief, APBREBES (2019).

46 Réseau Semences Paysannes, "Seeds and farmers' rights," 32-3.

47 De Schutter, "Seed policies," §13.

48 UPOV, *Explanatory note on exceptions to the plant breeders' rights under the 1991 Act of the UPOV Convention* (2009), 8-11.

49 UPOV, *UPOV report on the impact of plant variety protection* (2005). See, also, De Schutter, *Seed policies*, §26; International Seed Federation, *ISF view on intellectual property* (2012).

50 Michael Kock, *Open intellectual property models for plant innovations in the context of new breeding technologies*, *Agronomy* 11(6) (2021).

“intellectual property rights reward and encourage standardization and homogeneity, when what should be rewarded is agrobiodiversity, particularly in the face of the emerging threat of climate change and of the need, therefore, to build resilience by encouraging farmers to rely on a diversity of crops.”⁵¹

C. WHERE ARE THE CONFLICTS?

Intellectual property and seed marketing laws poses serious challenges for the protection of peasants’ right to seeds. Indeed, the boundaries between peasant and commercial seed systems are fluid. In this context, commercial seed regimes severely restrict or, in some cases, prohibit peasants’ right to use, save, exchange and sell farm-saved seeds. In some countries that have adopted laws compliant with UPOV 1991, peasants face civil and, in some cases, criminal sanctions for saving, reusing and exchanging farm-saved seeds from commercial varieties, that is, “for conduct that should be deemed legitimate and which is functional to society’s interest in a sustainable agriculture and the attainment of food security.”⁵²

These tensions are exacerbated in countries in the Global South, where a majority of the population is rural, and where the vast majority of the seeds comes from peasant seed systems.⁵³ In these countries, *sui generis* systems of plant variety protection adapted to local specificities are better suited to protecting the right to seeds enshrined in UNDROP.⁵⁴ And yet, some states of the Global North continue to push for states of the Global South to adopt the UPOV 1991 model, as if it were the only model for the regulation of IP over plant varieties.⁵⁵

Given the conflicts between peasants’ right to seeds, on the one hand, and IP and seed marketing laws, on the other, there was a pressing need to strengthen the protection of the right to seeds in international law, including through the recognition of peasants’ right to seeds in UNDROP.⁵⁶

51 De Schutter, “Seed policies,” §39. See, also, Fakhri, “Right to food,” §89.

52 Regine Andersen, “Some considerations on the relation between farmers’ rights, plant breeders’ rights and legislation on variety release and seed distribution,” Input paper for the Second Meeting of the Ad Hoc Technical Committee on Sustainable Use of Plant Genetic Resources for Food and Agriculture, Rome, 2–3 March 2015. See, also, Right to Food and Nutrition Watch Consortium, “Keeping seeds in peoples’ hands,” *Right to Food and Nutrition Watch* 8 (2016).

53 Coulibaly and Brac de la Perrière, “A dysfunctional PVP system.”

54 Correa, “Plant variety protection.”

55 See, for example, Golay and Dommen, “Switzerland’s foreign policy.”

56 Golay, “The right to seeds.”

3. THE RIGHT TO SEEDS AND STATES’ OBLIGATIONS IN UNDROP

This part opens with a brief introduction on UNDROP’s adoption and its holistic approach (Section A), followed by an explanation of the primacy of human rights norms in international law (Section B). It then describes the protection afforded to the right to seeds of peasant women (Section C), and presents the main elements of peasants’ right to seeds (Section D) and corresponding state obligations (Section E) in UNDROP.

A. UNDROP’S ADOPTION AND ITS HOLISTIC APPROACH

UNDROP was adopted in 2018, following 20 years of mobilisation by La Via Campesina and its allies, and 6 years of negotiation at the UN Human Rights Council.⁵⁷

On 28 September 2018, the Human Rights Council and its 47 Member States adopted UNDROP by a vote of 33 states in favour, 3 against and 11 abstentions. Then, on 17 December 2018, UNDROP was adopted by the UN General Assembly (composed of all UN Member States) with 121 states in favour, 8 against and 54 abstentions.⁵⁸

At the UN General Assembly, where all UN Member States voted, 48 African states voted in favour of UNDROP’s adoption and 3 of them abstained – Cameroon, Ethiopia and Lesotho.⁵⁹

It is important to note that, on the occasion of its adoption, the UN General Assembly called on all governments to disseminate the new UN Declaration and to promote universal respect and understanding thereof, without making any distinction on the basis of the votes of state. This is in conformity with the need for UN Member States to implement UN General Assembly resolutions in good faith.⁶⁰

57 Coline Hubert, *The United Nations Declaration on the Rights of Peasants: A tool in the struggle for our common future* (CETIM, 2019). See, also, Priscilla Claeys and Marc Edelman, “The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,” *Journal of Peasant Studies* 47, No. 1 (2019), 1–68.

58 UN General Assembly resolution 73/165 (2018).

59 African states that voted in favour of UNDROP’s adoption are Algeria, Angola, Benin, Botswana, Burundi, Cabo Verde, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. A few African states did not participate in the vote.

60 UN General Assembly resolution 73/165 (2018), §2.

UNDROP builds upon existing UN instruments and fills a gap in international law. Indeed, international law is fragmented on the matter, and UNDROP's elaboration represented a unique opportunity to recognize, in a single instrument, the rights of peasants, farmers, local communities, indigenous peoples, fisher people, pastoralists, nomads, hunters, gatherers, landless people, rural women and rural workers.⁶¹

In relation to the right to seeds, UNDROP builds on a number of binding international instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention), the CBD and its Protocols, and the Plant Treaty. It also builds on UNDRIP, the Right to Food Guidelines adopted at FAO in 2004⁶² and the reports presented by the UN Special Rapporteur on the right to food, including the report on seed policies presented by Olivier De Schutter in 2009.⁶³

Two of UNDROP's main contributions are 1) the recognition of individual and collective rights that can be transformed into legal entitlements in national and regional laws and that can become enforceable before judicial or quasi-judicial bodies at national, regional and international levels⁶⁴, and 2) the definition of states' obligations in a way that is more precise than in other international instruments.⁶⁵

B. THE PRIMACY OF HUMAN RIGHTS AND UNDROP OVER OTHER INTERNATIONAL INSTRUMENTS

In international law, in accordance with the UN Charter, international human rights instruments take precedence in the hierarchy of norms over other international instruments, such as those governing IP.⁶⁶

According to the UN Charter, the promotion and protection of human rights is one of the main purposes of the UN (Article 1.3), and UN Member States pledged to take joint and separate action to promote universal respect for human rights (Articles 55c and 56). The UN Charter also provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations

61 See Christophe Golay, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (Geneva Academy, 2015).

62 FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Right to Food Guidelines) (2004).

63 De Schutter, "Seed policies."

64 Christophe Golay, *The role of human rights mechanisms in monitoring the United Nations Declaration on the Rights of Peasants* (Geneva Academy, 2020).

65 Christophe Golay, *The implementation of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (Geneva Academy, 2019).

66 Christophe Golay, Karine Peschard, Olivier De Schutter, Hilal Elver, José Esquinas and Michael Fakhri, *Implementing the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in light of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)* (APBRES and Geneva Academy, 2022).

under the present Charter shall prevail" (Article 103).⁶⁷ In the Vienna Declaration and Programme of Action, all UN Member States reaffirmed that the promotion and protection of human rights is the first responsibility of governments.⁶⁸

UNDROP strongly reaffirms the primacy of human rights, including peasants' right to seeds, over other international norms such as those protecting commercial interests. This is reflected in two UNDROP articles, which provide that states shall elaborate, interpret and apply relevant international agreements and standards to which they are party in a manner consistent with their human rights obligations as they apply to peasants (Article 2.4); and that they shall ensure that seed policies, plant variety protection and other IP laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants (Article 19.8). Both these provisions reflect the fact that as higher-order norms, human rights cannot be traded off or undermined.⁶⁹

On the contrary, international norms including trade agreements and national laws and policies must be adapted to ensure the ongoing protection of human rights.⁷⁰ UNDROP further stipulates that "Nothing in the present Declaration may be construed as diminishing, impairing or nullifying the rights that peasants and other people working in rural areas and indigenous peoples currently have or may acquire in the future" (Article 28.1), and that the "exercise of the rights set forth in the present Declaration shall be subject only to such limitations as are determined by law and that are compliant with international human rights obligations."

In 2022, the Governing Body of the Plant Treaty recognized the need to take UNDROP into consideration in implementing the Treaty's Article 9 on farmers' rights by adopting two resolutions. Resolutions 7/2022 emphasizes the need to promote new developments in international human rights instruments and declarations⁷¹; while Resolution 14 emphasizes the need to increase cooperation with international human rights bodies, including the Human Rights Council.⁷²

67 See UN Charter, Arts. 1, 55, 56 and 103.

68 UN General Assembly, *Vienna Declaration and Programme of Action*, UN doc A/CONF.157/23 (1993), §1.1.

69 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17*, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15, §1c of the Covenant), UN doc E/C.12/GC/17 (2006), §51, 2, 7. It is interesting to note that the CESCR stated in the same General Comment that in implementing the right of everyone to benefit from science, states must respect and protect knowledge, innovations and practices of indigenous and local communities, which by definition include knowledge, innovations and practices related to seeds (§9). See, also, Uchenna F. Ugwu, "Maximizing the differentiation principle in regional IP treaties to advance food security: Limitations in West Africa's regional IP and trade regime," *The Journal of World Intellectual Property* 5, No. 6 (2021), 22.

70 Golay, "The right to seeds."

71 FAO ITPGRFA, *Resolution 7/2022*, Implementation of Article 9, Farmers' Rights.

72 FAO ITPGRFA, *Resolution 14/2022*, Cooperation with other international bodies and organizations.

C. THE RIGHT TO SEEDS OF PEASANT WOMEN

Peasant women play a key role in local and global food security – producing food crops and earning incomes to feed their families.⁷³ Their role is also central in peasant seed systems, where it is estimated that women produce, select and save up to 90 percent of the seeds and germplasm used as planting material in peasant agriculture. Yet women and girls represent 70 percent of the world’s hungry, and are subject to multiple forms of discrimination in access to productive resources, including seeds.⁷⁴

In international human rights law, rural women’s rights have been recognized in Article 14 of the CEDAW Convention and, in a very similar way, in UNDROP Article 4. Read together with UNDROP Article 19 on the right to seeds, UNDROP Article 4 provides that states shall eliminate all forms of discrimination against peasant women and other women working in rural areas, promote rural women’s empowerment and ensure that peasant women enjoy the right to seeds without discrimination.

The UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), in the General Recommendation No. 34 (2016) interpreting Article 14 of the CEDAW Convention, recognized that rural women’s right to seeds is a fundamental human right.⁷⁵

D. THE MAIN ELEMENTS OF PEASANTS’ RIGHT TO SEEDS

This section describes the main elements of peasants’ right to seeds enshrined in UNDROP. These are peasants’ rights 1) to maintain, control, protect and develop their own seeds and traditional knowledge, 2) to the protection of traditional knowledge, innovation and practices relevant to seeds, 3) to participate in decision-making on matters relating to seeds, 4) to equitably participate in the sharing of benefits arising from the utilization of seeds, and 5) to save, use, exchange and sell farm-saved seed or propagating material.

1. PEASANTS’ RIGHT TO MAINTAIN, CONTROL, PROTECT AND DEVELOP THEIR OWN SEEDS AND TRADITIONAL KNOWLEDGE

UNDROP

Article 19.2

Peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge.

⁷³ FAO, *The state of food and agriculture 2010-2011. Women in agriculture: Closing the gender gap for development*, 5.

⁷⁴ De Schutter, “Seed policies,” §42.

⁷⁵ CEDAW Committee, *General recommendation No. 34 on the rights of rural women*, CEDAW/C/GC/34 (2016), §56.

The overwhelming majority of people living in rural areas in the Global South rely on peasant food and seed systems, which are essential to their own food security, and to global food security and biodiversity. However, plant-related IP and the promotion of commercial seed systems pose serious challenges to the maintenance of peasant food and seed systems, and of agrobiodiversity.

To respond to these challenges, UNDROP recognizes peasants’ right to maintain, control, protect and develop their own seeds and traditional knowledge (Article 19.2) – similar to how UNDRIP recognizes this right to indigenous peoples.⁷⁶ UNDROP also defines states’ obligations to support peasant seed systems and to promote the use of peasant seeds and agrobiodiversity (Article 19.6).

2. THE RIGHT TO THE PROTECTION OF TRADITIONAL KNOWLEDGE, INNOVATION AND PRACTICES RELEVANT TO SEEDS

UNDROP

Article 19.1

Peasants and other people working in rural areas have the right to seeds ..., including:

(a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture.

Article 20.2

States shall take appropriate measures to promote and protect the traditional knowledge, innovation and practices of peasants and other people working in rural areas, including traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity.

As we have seen, the CBD requests states parties to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”⁷⁷ The protection of traditional knowledge relevant to seeds has also been reaffirmed in the Plant Treaty,⁷⁸ the Nagoya Protocol⁷⁹ and the FAO Right to Food Guidelines.⁸⁰

In Articles 19.1a and 20.2, UNDROP clarifies the international standards for the protection of the traditional knowledge, innovation and practices of peasants, in-

⁷⁶ See UNDRIP, Art 31.1.

⁷⁷ CBD, Art. 8(j).

⁷⁸ Plant Treaty, Art. 9.2a.

⁷⁹ Nagoya Protocol, Art. 7.

⁸⁰ FAO Right to Food Guidelines, Guideline 8.12.

cluding in relation to seeds, and calls upon states to adopt all possible measures at law and policy levels for their preservation and protection.⁸¹

3. THE RIGHT TO PARTICIPATE IN DECISION-MAKING ON MATTERS RELATING TO SEEDS

Article 19.1

Peasants and other people working in rural areas have the right to seeds ..., including:

(c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture.

UNDROP acknowledges the structural discrimination against peasants and other people working in rural areas, and recognizes their right to participation in decision-making processes to end that discrimination.

Concretely, UNDROP provides that peasants “have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods” (Article 10.1). In relation to the right to seeds, and building on existing instruments, including the Plant Treaty, UNDROP provides that peasants have the “right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture” (Article 19.1c).

4. THE RIGHT TO EQUITABLY PARTICIPATE IN THE SHARING OF BENEFITS ARISING FROM THE UTILIZATION OF SEEDS

UNDROP

Article 19.1

Peasants and other people working in rural areas have the right to seeds ..., including:

(b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture.

⁸¹ See, also, UNDROP, Art. 26.1 et 26.3.

In addition to protecting seed-related traditional knowledge, and to ensuring peasants’ participation in decision-making on seed-related matters, states have also undertaken, under the CBD, the Plant Treaty, the Nagoya Protocol and the FAO Right to Food Guidelines, the obligation to protect and promote the rights of indigenous and local communities – including peasants – to equitably participate in the sharing of benefits arising from the utilization of PGRFA, including seeds.⁸² UNDROP Article 19.1b recognizes that these entitlements are human rights guarantees.

5. THE RIGHT TO SAVE, USE, EXCHANGE AND SELL FARM-MADE SEED OR PROPAGATING MATERIAL

UNDROP

Article 19

1. Peasants and other people working in rural areas have the right to seeds ..., including:

(d) The right to save, use, exchange and sell their farm-made seed or propagating material.

For over 10,000 years, peasants have freely saved, selected, exchanged and sold farm-made seeds, as well as used and reused them to produce food.⁸³ These customary rights have been recognized in the Plant Treaty.⁸⁴

In the Plant Treaty, states recognized this right of peasants over farm-made seeds, without making any distinction between farm-made seeds of peasant varieties and farm-made seeds of IP-protected varieties. As the Plant Treaty was adopted by consensus at FAO in 2001, UNDROP negotiators decided to recognize similar entitlements in Article 19 of UNDROP.

Peasants’ right to save, use, exchange and sell farm-made seed or propagating material, enshrined in UNDROP Article 19.1d, creates entitlements over farm-made seeds of both peasant varieties and IP-protected varieties.

In the implementation of this right, states could draw inspiration from examples of good practice at national and regional levels.⁸⁵ In the 2001 Protection of Plant Varieties and Farmers Rights Act,⁸⁶ India recognized peasants’ rights to save, use,

⁸² See CBD, Art. 8(j); Nagoya Protocol, Art. 5; Plant Treaty, Art. 9; and FAO Right to Food Guidelines, Guideline 8.12.

⁸³ Andersen, “The history of farmers’ rights.”

⁸⁴ See Plant Treaty, Preamble and Art. 9.

⁸⁵ Correa, “Plant variety protection.”

⁸⁶ See Protection of Plant Varieties and Farmers’ Rights Act; Sujit Koonan, *Developing country sui generis options: India’s sui generis system of plant variety protection* (Quaker UN Office, 2014).

sow, resow, exchange, share and sell farm produce, including seeds of varieties protected by plant breeders' rights (Article 39).⁸⁷ By adopting the African Model Law,⁸⁸ the African Union (AU) aimed at promoting peasants' right to use a new variety protected by breeders' rights to develop peasant varieties, and their right to collectively save, use, multiply and process farm-saved seed of protected varieties (Article 26e and 26f).

E. STATES' OBLIGATIONS

States have defined their obligations in relation to the right to seeds in several UNDROP articles.⁸⁹ In this section, we will see that they have committed (1) to ensure the consistency of their national laws and policies, and of international agreements and standards to which they are party, with the right to seeds, (2) to respect, protect and fulfil the right to seeds, (3) to support peasant seed systems and promote the use of peasant seeds and agrobiodiversity, (4) to ensure the participation of peasants in decision-making processes pertaining to seeds, and (5) to ensure that agricultural research and development integrates the needs of peasants, with their active participation.

1. OBLIGATION TO ENSURE THE CONSISTENCY OF INTERNATIONAL AGREEMENTS AND STANDARDS, AND OF NATIONAL AND REGIONAL LAWS AND POLICIES WITH THE RIGHT TO SEEDS

UNDROP

Article 2.4

States shall elaborate, interpret and apply relevant international agreements and standards to which they are a party in a manner consistent with their human rights obligations as applicable to peasants and other people working in rural areas.

Article 15.5

States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in this Declaration.

Article 19.8

States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.

⁸⁷ Safeguards have been provided against innocent infringement by farmers, so that farmers who unknowingly violate the rights of a breeder are not to be punished if they can prove that they were unaware of the existence of a breeder's right. [Protection of Plant Varieties and Farmers Rights Act \(2001\)](#), Art. 42.

⁸⁸ OAU, "[African Model Legislation](#)."

⁸⁹ See, also, Golay, "[The implementation](#)."

In accordance with the primacy to be given to human rights norms in international and national laws (see section 3B above), states have committed to ensure the consistency of their national laws and policies, and of international agreements and standards to which they are party, with peasants' right to seeds.

In implementing UNDROP Article 2.4, states shall ensure that the negotiation, interpretation and implementation of World Intellectual Property Organization (WIPO), WTO and UPOV instruments, as well as any other international agreement governing IP, do not violate but, on the contrary, facilitate the realization of the right to seeds.

States shall also ensure that free trade agreements to which they are party do not lead to violations of peasants' right to seeds in their country or in other countries. This implies that they shall, inter alia, stop promoting the 1991 Act of the UPOV Convention as if it were the only IP model for plant varieties.⁹⁰ Instead, states should encourage commercial partner countries to use the option offered by the TRIPS Agreement to design sui generis systems of plant variety protection that are adapted to their agricultural and social specificities, and that protect the right to seeds.⁹¹

At the national level, states shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in UNDROP (Article 15.5). They shall also ensure that seed policies, plant variety protection and other IP laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas (Article 19.8).

UNDROP also provides that – without disregarding specific legislation on indigenous peoples – states shall consult and cooperate in good faith with peasants, through their own representative institutions, before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect their rights, engaging with and seeking the support of those who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes (Article 2.3).

⁹⁰ See, for example, Golay and Dommen, "[Switzerland's foreign policy](#)."

⁹¹ Correa, "[Plant Variety Protection](#)"; Coulibaly and Brac de la Perrière, "[A dysfunctional PVP system](#)."

2. OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS

UNDROP

Article 2.1

States shall respect, protect and fulfil the rights of peasants and other people working in rural areas. They shall promptly take legislative, administrative and other appropriate steps to achieve progressively the full realization of the rights of the present Declaration that cannot be immediately guaranteed.

Article 19.3

States shall take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas.

In international human rights law, it is generally accepted that states have the obligation to respect, protect and fulfil all human rights.⁹² The “respect, protect and fulfil” typology can also be used to define states’ extraterritorial obligations.⁹³ The inclusion in UNDROP of states’ obligations to respect, protect and fulfil the rights of peasants in general (Article 2.1), and the right to seeds in particular (Article 19.3), is therefore in conformity with international human rights law.

In his report on seed policies, Olivier De Schutter defined what would constitute a violation of the obligations to respect, protect and fulfil the rights to food.⁹⁴ In his view, the obligation to respect would be violated if states were to introduce legislation or other measures that create obstacles to the reliance of peasants on their own seed systems, as this would deprive peasants from the means to sustain their livelihoods. The obligation to protect would be violated if a state failed to regulate the activities of patent-holders or plant breeders, so as to prevent them from violating the right to food of the peasants dependent on those inputs to farm. According to the obligation to fulfil, states must proactively strengthen peasants’ access to and utilization of resources and means to ensure their livelihood; states must also improve methods of food production by making full use of technical and scientific knowledge. Olivier De Schutter added that, “in the absence of proactive policies aimed at preserving and encouraging the development of farmers’ seed systems and associated traditional knowledge and practices, such systems risk disappearing.”⁹⁵

⁹² See, for example, CESCR, [General Comment No. 12: The right to adequate food](#), Art. 11, E/C.12/1999/5 (1999): §15.

⁹³ ETO Consortium, [Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights](#) (2013).

⁹⁴ De Schutter, “[Seed policies](#),” §§4-6.

⁹⁵ De Schutter, “[Seed policies](#),” §48.

3. OBLIGATIONS TO SUPPORT PEASANT SEED SYSTEMS AND TO PROMOTE THE USE OF PEASANT SEEDS AND AGROBIODIVERSITY

UNDROP

Article 11.3

States shall take appropriate measures to promote the access of peasants and other people working in rural areas to a fair, impartial and appropriate system of evaluation and certification of the quality of their products at the local, national and international levels, and to promote their participation in its formulation.

Article 19.6

States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity.

As stated by Olivier De Schutter, “merely removing barriers to the saving, exchange or selling of seeds will not suffice: for farmers’ rights to be truly realized, Governments should accept that they have duties to support farmers’ seed systems.”⁹⁶ This obligation was included in UNDROP Article 19.6. In implementing Article 11.3, states shall also promote a fair, impartial and appropriate system of evaluation and certification of the quality of peasant seeds, and promote peasants’ participation in its formulation.

UNDROP’s implementation represents a unique opportunity to remedy the lack of support given to peasant seed systems as compared to commercial seed systems. This is essential to protect the rights of hundreds of millions of peasants, as well as the interest of all in the preservation of agrobiodiversity.⁹⁷

4. OBLIGATION TO ENSURE PEASANTS’ PARTICIPATION IN DECISION-MAKING PROCESSES PERTAINING TO SEEDS

UNDROP

Article 10.1

Peasants and other people working in rural areas have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods.

Article 10.2

States shall promote the participation, directly and/or through their representative organizations, of peasants and other people working in rural areas in decision-

⁹⁶ De Schutter, “[Seed policies](#),” §44.

⁹⁷ De Schutter, “[Seed policies](#),” Summary.

king processes that may affect their lives, land and livelihoods; this includes respecting the establishment and growth of strong and independent organizations of peasants and other people working in rural areas and promoting their participation in the preparation and implementation of food safety, labour and environmental standards that may affect them.

Article 11.2

States shall adopt appropriate measures to ensure that peasants and other people working in rural areas have access to relevant transparent, timely and adequate information in a language and form and through means adequate to their cultural methods so as to promote their empowerment and to ensure their effective participation in decision-making in matters that may affect their lives, land and livelihoods.

Article 19.1

Peasants and other people working in rural areas have the right to seeds ..., including:

(c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture.

Article 25.3

States shall encourage equitable and participatory farmer-scientist partnerships, such as farmer field schools, participatory plant breeding, and plant and animal health clinics to respond more appropriately to the immediate and emerging challenges that peasants and other people working in rural areas face.

Article 27.1

The specialized agencies, funds and programmes of the United Nations system, and other intergovernmental organizations, including international and regional financial organizations, shall contribute to the full realization of the present Declaration, including through the mobilization of, inter alia, development assistance and cooperation. Ways and means of ensuring the participation of peasants and other people working in rural areas on issues affecting them shall be considered.

As we have seen, UNDROP acknowledges the structural discrimination against peasants, and recognizes, among others, their right to participation in decision-making processes to end that discrimination. To guarantee that right, UNDROP provides, inter alia, that states shall ensure the participation of peasants, directly and/or through their representative organizations, in decision-making processes related to seeds (Articles 10.1, 10.2 and 19.1), as well as their right to information (Article 11.2). States shall also encourage equitable and participatory farmer-scientist partnerships to respond to the challenges that peasants face (Article 25.3). UNDROP also provides that UN specialized agencies, funds and programmes, and other intergovernmental organizations, shall contribute to the full realization of UNDROP, and consider ways to ensure peasants' participation on issues affecting them, which include issues affecting their right to seeds (Article 27.1).

5. OBLIGATION TO ENSURE THAT AGRICULTURAL RESEARCH AND DEVELOPMENT INTEGRATE THE NEEDS OF PEASANTS, WITH THEIR ACTIVE PARTICIPATION

UNDROP

Article 19.7

States shall take appropriate measures to ensure that agricultural research and development integrates the needs of peasants and other people working in rural areas, and to ensure their active participation in the definition of priorities and the undertaking of research and development, taking into account their experience, and increase investment in research and the development of orphan crops and seeds that respond to the needs of peasants and other people working in rural areas.

In addition to supporting peasant seed systems and ensuring peasants' participation in decision-making processes in relation to seeds, it is important that states support research and development that contribute to the realization of peasants' right to seeds. During UNDROP's negotiation, support and protection given to three innovation circles that coexist in relation to seeds were discussed: 1) innovation through biotechnology and 2) innovation by plant breeders, which are protected by patents and plant variety protection, respectively, and 3) innovation by peasants, which is currently not protected in international law, but is fundamental to the realization of peasants' rights and to the protection of agrobiodiversity, and represents the basis of other types of innovation.⁹⁸

Article 19.7 of UNDROP provides that states shall ensure that agricultural research and development integrates the needs of peasants, and shall ensure their active participation in the definition of priorities and the undertaking of research and development, taking into account their experiences. This article also provides that states shall increase investment in research and development of neglected and underutilized crops and seeds that respond to peasants' needs.

98 De Schutter, "Seed policies."

4. MAIN CHALLENGES TO THE PROTECTION OF THE RIGHT TO SEEDS IN AFRICA

The implementation of UNDROP in African countries faces significant challenges due to Africa's complex and fragmented seed and IP regimes. Section A gives an overview of Africa's legal regimes as they relate to seeds and biodiversity. It maps the relevant protocols, agreements, laws and policies at the continental, regional and national levels. The remaining sections (B to E) present the specific challenges related to the main elements of the right to seeds enshrined in UNDROP and identified in Section 3D above.

A. OVERVIEW OF THE LEGAL REGIMES GOVERNING SEEDS IN AFRICA

1. THE WTO TRIPS AGREEMENT

Most countries in Africa are members of the World Trade Organization, and therefore party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which came into force in 1995. The exceptions are Algeria, Ethiopia, Libya, Somalia, Sudan and South Sudan, which have observer status; and Eritrea, which is not a member.⁹⁹ Article 27.3b of the TRIPS Agreement stipulates that member countries must provide patent protection for microorganisms and microbiological processes. They must also provide some form of IP for plant varieties, either through patents, a sui generis system, or a combination of both.¹⁰⁰ Prior to the TRIPS Agreement, only Kenya, South Africa and Zimbabwe had plant variety protection systems in place.¹⁰¹

Importantly, Article 66 of the TRIPS Agreement exempts least developed countries (LDCs) from implementing the Agreement “in view of [their] special needs and requirements, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base.”¹⁰² Initially granted until 1 January 2005, this exemption has been extended until 1 July 2034, and may well

⁹⁹ See [Members and observers of the WTO](#).

¹⁰⁰ World Trade Organization, [TRIPS Agreement](#), Art. 27.3b.

¹⁰¹ Titilayo Adebola, “[Access and benefit sharing, farmers' rights and plant breeders' rights: reflections on the African Model Law](#),” *Queen Mary Journal of Intellectual Property* 9, no. 1 (2019), 105-21.

¹⁰² The LDCs' exemption excludes Articles 3, 4 and 5. See WTO, [TRIPS Agreement](#), Article 66.

be extended beyond.¹⁰³ Out of the 46 least developed countries worldwide, 33 are located in Africa.¹⁰⁴ These countries are therefore exempted from implementing Article 27.3b.

2. AFRICAN REGIONAL IP ORGANIZATIONS

The two regional IP organizations are the African Regional Intellectual Property Organization (ARIPO) and the African Intellectual Property Organization (known by its French acronym, OAPI).

ARIPO was created in 1976 by the Lusaka Agreement.¹⁰⁵ As of 2022, it comprises 21 Member States, mostly located in Southern Africa and Eastern Africa.¹⁰⁶ Different dimensions of IP are regulated by distinct protocols. For instance, patents are governed by the Harare Protocol, which was adopted in 1982 and entered into force in 1984.¹⁰⁷ The Arusha Protocol for the Protection of New Varieties of Plants was adopted in 2015, but is not yet in force.¹⁰⁸ For the Arusha protocol to enter into force, four states must deposit their instruments of ratification or accession. As of 2022, only two states – Rwanda, and São Tomé and Príncipe – had done so.¹⁰⁹

ARIPO's sister organization, OAPI, was founded in 1977 by the Bangui Agreement.¹¹⁰ As of 2022, it is made up of 17 Member States in West Africa and Central Africa.¹¹¹ Annex I of the Bangui Agreement deals with patents. The original agreement did not cover plant variety protection. OAPI introduced Annex X on plant variety protection during the 1999 revision, and it entered into force in 2006.

Both ARIPO and OAPI are intergovernmental organizations that grant and administer IP titles – including patents and plant variety certificates – on behalf of their Member States. However, there are a number of differences between the two organizations.¹¹² First, ARIPO member states have their own domestic IP legislation

¹⁰³ WTO, [WTO members agree to extend TRIPS transition period for LDCs until 1 July 2034](#), News, 29 June 2021.

¹⁰⁴ UNCTAD, [Map of the least developed countries](#).

¹⁰⁵ More details can be found at [African Regional Intellectual Property Organization \(ARIPO\)](#).

¹⁰⁶ ARIPO Member States are: Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Namibia, Rwanda, São Tomé e Príncipe, Seychelles, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.

¹⁰⁷ ARIPO, [Harare Protocol on Patents and Industrial Designs](#), 2020.

¹⁰⁸ ARIPO, [Arusha Protocol for the Protection of New Varieties of Plants](#), 2015.

¹⁰⁹ For a critique of the Arusha Protocol, see African Centre for Biodiversity, [The Arusha Protocol and regulation: Institutionalising UPOV 1991 in African seed systems and laws](#) (2018).

¹¹⁰ OAPI, [Bangui Agreement Instituting an African Intellectual Property Organization, Act of December 14, 2015](#). For a concise history of its predecessor, OAMPI, see Coulibaly and Brac de la Perrière, “[A dysfunctional PVP system](#),” 8.

¹¹¹ OAPI member states are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal and Togo. See OAPI website, [États Membres](#), accessed April 21, 2022.

¹¹² Anthony de Andrade and Venkatesh Viswanath, “[The costs of patenting in Africa: A tale of three intellectual property systems](#),” IPWatchdog (2017).

that co-exists with the various ARIPO protocols, and they are free to adhere to individual ARIPO protocols. In contrast, OAPI member states do not have their own IP legislation: OAPI instruments stand for their national legislation and are directly applied. Second, ARIPO member states have the option of refusing a patent or a plant variety certificate granted by ARIPO within their territory, whereas OAPI members do not have such an option.¹¹³ Third, ARIPO conducts a substantive examination of patent applications to ensure that they meet the criteria for patentability. In contrast, until recently, OAPI merely carried out formal examination of patent applications for procedural compliance. However, following the 2015 revision of the Bangui Agreement, OAPI announced that all applications would be subject to a substantive examination.

Together, the two organizations include a majority of African countries (38 out of 54). Two of the leading economies, Nigeria and South Africa, as well as countries in North Africa¹¹⁴ are not part of either organization. In these countries, patents and PVP are regulated under national law. There are wide variations: while South Africa introduced PVP legislation in 1961, Nigeria only did so in 2021 (see Box 2).¹¹⁵

3. INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)

ARIPO, OAPI and some of the African trade blocks have adopted legislation on plant variety protection based on the 1991 Act of the UPOV Convention, even though they are under no obligation to do so. This is the case of Annex X of the Bangui Agreement (OAPI), the Arusha PVP Protocol (ARIPO), the SADC PVP Protocol and the EAC Seed and Plant Varieties (SPV) Bill. Annex X of the Bangui Agreement was drafted by the UPOV Office itself.¹¹⁶

In Africa, only seven countries have joined UPOV as member states: South Africa (1981), Tunisia (2003), Morocco (2006) Tanzania (2015), Kenya (2016), Egypt (2019), and Ghana (2021). As of 2022, all are party to the 1991 Act, except South Africa, which is party to the 1978 Act. In addition, 17 countries are covered by UPOV 1991 indirectly through their membership in OAPI. Indeed, OAPI is one of the two intergovernmental organizations that are party to UPOV 1991 (the other being the EU).

113 See Art. 4 of the Arusha Protocol. Some legal experts have argued that the right to reject PVP titles granted by ARIPO means that the Arusha Protocol is not in line with the UPOV Convention and, therefore, that countries bound by the Protocol cannot become individual members of UPOV on this basis. See APBREBES, *UPOV breaking its own rules to tie-in African countries* (2014).

114 For a recent study of peasant seed systems in North Africa (in French), see Mohamed Coulibaly, *Assurer la résilience de l'agriculture dans la région Nord-Afrique: les semences paysannes comme solution aux crises majeures*, Rosa Luxembourg Stiftung (2023).

115 Peschard, "Searching for flexibility"; Titilayo Adebola, "Examining plant variety protection in Nigeria: Realities, obligations and prospects" *Journal of World Intellectual Property* 22, no. 1-2 (2019), 36-58. Federal Republic of Nigeria, *Plant Variety Protection Act, 2021*.

116 UPOV Council, *Annual Report of the Secretary-General for 1997*, C/32/2, 11-2, Thirty-Second Ordinary Session Geneva, 28 October 1998.

Strong PVP regimes and adherence to UPOV 91 have been pushed in Africa since the mid-2000s by intergovernmental IP organizations (UPOV, WIPO), the G8 New Alliance for Food Security and Nutrition, and philanthro-capitalist organizations such as the Alliance for a Green Revolution in Africa (AGRA) and the Gates Foundation.¹¹⁷ Some countries have adhered to UPOV 1991 as part of bilateral trade agreements – for example the EFTA-Morocco FTA¹¹⁸, the US-Morocco FTA¹¹⁹ and the EFTA-Egypt FTA.¹²⁰ As we will see in the next section, UPOV 91 is also being introduced on the continent through regional trade agreements. Finally, African countries have been under pressure to adopt strong IP norms by US and EU trade policies that make foreign direct investment conditional upon strong IP protection.¹²¹

4. REGIONAL ECONOMIC COMMUNITIES

There are several regional trade blocks on the African continent, most of which include IP agendas and harmonisation of seed marketing regulations. The main Regional Economic Communities are the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC).

The Southern African Development Community (SADC) adopted a PVP Protocol in 2017¹²², and the East African Community (EAC) adopted a Seed and Plant Varieties (SPV) Bill in 2018.¹²³ Both these instruments are modelled on the 1991 Act of the UPOV Convention.

All four RECs – COMESA, EAC, ECOWAS and SADC – also provide guidance on the regulation of seed marketing, although with varying level of bindingness (see Section 4B.2).

117 For a detailed example of the role of foreign governments and private actors in Kenya's accession to UPOV 91, see Claire O'Grady Walsh, *Globalization and Seed Sovereignty in Sub-Saharan Africa* (Palgrave Macmillan, 2019), 136-49.

118 EFTA-Morocco FTA, *Annex V – Protection of intellectual property* (1999), Art. 2.3.

119 US-Morocco FTA, *Chapter 15 – Intellectual Property Rights* (2014), Art. 15.1 (2e).

120 EFTA-Egypt FTA, *Annex V – Protection of intellectual property rights* (2007), Art. 2 (2e).

121 As in the case of the 2000 US African Growth and Opportunities Act (AGOA) and EU Economic Partnerships Agreements (EPAs), such as the SADC-EU EPA (2016). See Chidi Oguamanam, "Breeding Apples for Oranges: African's Misplaced Priority over Plant Breeders' Rights", *The Journal of World Intellectual Property* 18, no. 5 (2015): 169-71.

122 See SADC PVP Protocol (2014). For a critical analysis, see *The SADC PVP Protocol: Blueprint for uptake of UPOV 1991 in Africa* (African Centre for Biodiversity, 2018). As of 2022, the protocol had not received enough signatures to come into effect.

123 For a civil society reaction to the EAC Seed and Plant Varieties Bill, see *Concerns with the Draft EAC Seed and Plant Varieties Bill* (African Centre for Biodiversity, 2018).

5. THE AFRICAN CONTINENTAL FREE TRADE AREA IP PROTOCOL

The African Continental Free Trade Area (AfCFTA) was launched in 2018 under the auspices of the AU, and it covers all the African countries except for Eritrea. Its aim is to create a single continent-wide market for goods, services and people. The AfCFTA Agreement includes a series of protocols covering distinct areas, including IP.¹²⁴ Similar to the WTO, member states are bound to fulfil the obligations set out in all the protocols.

The proposed AfCFTA IP Protocol replaces an earlier attempt at adopting a continental IP regime under the auspices of the AU by establishing a Pan-African Intellectual Property Organization (PAIPO).¹²⁵ Adopted in 2016, the PAIPO Statute was signed by only six countries and was never ratified.¹²⁶ The AfCFTA IP Protocol was due to be completed in January 2021, when trading under the AfCFTA officially started, but was delayed by the Covid pandemic.¹²⁷ The text of the draft IP Protocol has not yet been made public, but it is based on UPOV 1991.¹²⁸

In addition to the IP Protocol, two other AfCFTA policy instruments are directly relevant for the right to seeds: the AU continental guidelines for the harmonization of seed regulatory frameworks¹²⁹ and for the use of biotechnology.¹³⁰ The drafts guidelines have met with significant opposition from CSOs on both procedural and substantial grounds. CSOs argue that the process for developing the guidelines lacks transparency and participation, and that the draft guidelines undermine farmers' rights and agricultural biodiversity.¹³¹

6. THE AFRICAN MODEL LAW

This overview of Africa's IP regimes would not be complete without a presentation of the African Model Law, adopted in 2000 by the Organization of African Unity (the OAU changed its name to African Union in 2002). The African Model Law has not been widely taken up by African countries, but it has continued relevance for the development of policy and legislation in Africa, and is by and large in line with peasants' rights as enshrined in UNDROP.¹³²

124 AU, [Agreement establishing the African Continental Free Trade Area](#) (2018).

125 AU, [Statute of the Pan-African Intellectual Property Organisation](#) (2016).

126 AU, [List of countries which have signed, ratified/acceded to the Statute of the Pan African Intellectual Property Organization \(PAIPO\)](#) (2019).

127 WIPO Magazine, [The African Continental Free Trade Area: A significant role for IP](#) (2020).

128 Peter Munyi, [Current developments in seed laws harmonisation in Africa. Report to the European Commission](#). DeSIRA-LIFT (2022), 25.

129 Josiah Wobil, [Development of continental guidelines for the harmonization of seed regulatory frameworks in Africa \(Draft\)](#), AUC/DREA/C/036 (2021). On file with the authors.

130 AUC, [Continental guidelines for the use of biotechnology to enhance agricultural productivity for food security and nutrition in Africa \(Draft Report\)](#), AUC/DREA/C/037 (2021). On file with the authors.

131 For African civil society's response to the draft, see ACB et al., "[Submission on behalf of African CSOs to Josiah Wobil](#)" (2021); and ACB, [Guidelines for the harmonisation of seed regulatory frameworks in Africa: Call for African social movements to block the validation meeting](#) (2021).

132 See, for example, Oguamanam, "Breeding Apples"; and Adebola, "[Mapping](#)."

The African Model Law was never intended to have the status of a Convention or Treaty, but rather to guide African countries in the process of developing domestic laws and policies to implement obligations under the TRIPS Agreement and the CBD. Using the sui generis option available under Article 27.3b of the TRIPS Agreement¹³³, the aim was to balance IP with farmers' rights and the conservation and sustainable use of biological diversity and genetic resources. Since 2000, the African Model Law has been revised and updated to take into account important developments in international law.¹³⁴

In its preamble, the African Model Law states that "Whereas, all forms of life are the basis for human survival, and, therefore, the patenting of life, or the exclusive appropriation of any life form or part or derivative thereof violates the fundamental human right to life."¹³⁵ Accordingly, Article 9 of the African Model Law prohibits patents on life forms and biological processes. This provision conflicts with Article 27.3b of the TRIPS Agreement, which provides for limited exclusions to patentability. However, it is consistent with African countries' long-standing position against the patenting of life forms, as defended by the African Group at WIPO and the WTO.¹³⁶

With regard to plant variety protection, the African Model Law was designed as an alternative to the UPOV Convention that would 1) be adapted to African needs, 2) balance the interests of farming communities and those of commercial plant breeders, and 3) offer a comprehensive and coherent legal framework for international obligations related to IP, farmers' rights and the regulation of access to biological resources. For instance, the African Model Law provides that "Where the Government considers it necessary, in the public interest, the Plant Breeders' Rights in respect of a new variety shall be subject to conditions restricting the realization of those rights." Such restrictions may be imposed, inter alia, to ensure food security, nutritional or health needs; to fulfil the requirements of the farming community for propagating material; and to promote the public interest for socio-economic reasons and for developing indigenous and other technologies.¹³⁷

The African Model Law, however, failed to gain traction and was not taken up by AU member states, with the exception of Ethiopia.¹³⁸ On the contrary, African countries moved in the opposite direction by passing PVP laws modelled on UPOV 1991, and by adopting industry norms for the use of biotechnology and for the harmonisation of seed regulatory frameworks.¹³⁹

133 Johnson A. Ekpere, [The OAU's Model Law: An Explanatory Booklet](#) (OAU, 2000).

134 See Peter Munyi et al., [A gap analysis report on the African Model Law](#) (AUC, 2012); and AUC, [Strategic guidelines for the coordinated implementation of the Nagoya Protocol](#) (2015).

135 OAU, "[African Model Legislation](#)."

136 For a summary of the African position on patents on life forms, see South Centre and African Trade Policy Centre, [The TRIPS and WTO negotiations: Stakes for Africa](#) (2017), 8-9.

137 OAU, "[African Model Legislation](#)," Art. 33.

138 The African Model Law faced international opposition from pro-IP industry and governments. Two additional factors that hindered its uptake was the fact that it did not offer ready-made template for legislation (as does UPOV), nor did the AU offer support in the development of PVP laws (as the UPOV Secretariat does). See Adebola, "[Mapping](#)," 241.

139 Adebola, "[Access and benefit sharing](#)."

B. CHALLENGES TO PEASANTS' RIGHT TO MAINTAIN, CONTROL, PROTECT AND DEVELOP THEIR OWN SEEDS

In Africa, a host of national and regional policies, laws and regulations impact peasants' right to maintain, control, protect and develop their own seeds and traditional knowledge, as defined by UNDROP Article 19.2. The most relevant are those that deal with 1) intellectual property, 2) seed marketing, and 3) biosafety.

1. INTELLECTUAL PROPERTY

a. Plant-Related Patents

In line with the TRIPS Agreement, both the Harare Protocol (ARIPO) and Annex I to the Bangui Agreement (OAPI) allow the grant of patents on microorganisms and microbiological processes. Both instruments explicitly exclude from patentability plant varieties, animal species, and essentially biological processes for the production of plants or animals.¹⁴⁰

As we have seen, in ARIPO member states, national patent laws coexist with the Harare Protocol, and there are differences among the members' domestic legislations. For example, under Kenya's Industrial Property Act (2001), only plant varieties are non-patentable inventions.¹⁴¹ Zambia, in contrast, does not grant patents on, inter alia, 1) plants or animal varieties or essentially biological processes for the production of plants or animals; 2) DNA, including complementary DNA sequences, cells, cell lines and cell cultures and seeds; 3) the whole or part of natural living beings and biological materials found in nature, even if isolated or purified, including the genome or germplasm of any natural living being; and 4) an invention which is traditional knowledge or is an aggregation or duplication of traditional knowledge.¹⁴²

As for countries that are not members of either regional IP organization, patents are regulated exclusively under domestic patent laws. This is the case of South Africa, whose Patents Act provides for exclusions from patentability similar to those of ARIPO and OAPI.¹⁴³ In South Africa, patents can be registered without undergoing a substantive examination. This means that there is no analysis of whether the invention meets the patentability requirements, and the validity of a granted patent can only be determined by the courts after a legal challenge has been filed. There are numerous cases of patents overturned by the courts, for instance for not meeting the novelty criteria. However, few citizens and communities have the funds and resources to bring forward legal challenges.¹⁴⁴

140 See, respectively, Section 3.10 of the [Harare Protocol](#), and Art. 2, Annex I of the [Bangui Agreement](#).

141 Kenya, [Industrial Property Act, 2001](#), Art. 26. In addition, "inventions contrary to public order, morality, public health and safety, principles of humanity and environmental conservation" are non-patentable.

142 Republic of Zambia, [The Patents Act, 2016](#), Art. 17.

143 South Africa, [Patents Act, 1978](#), Section 25.

144 OXFAM, [The status of patenting plants in the Global South \(2018\)](#), 22.

A patent grants exclusive rights to the inventor for a period of 20 years, requiring anyone using the invention to pay licensing fees to the patent-holders. To be patented, inventions must be new, involve an inventive step and be susceptible to industrial application. Peasant innovation cannot qualify for patent protection as it does not meet criteria for patentability designed for commercial crops. In any case, the kind of individual and exclusive rights granted by patents does not reflect the values and logic of peasant seed systems.

Patents may have very broad claims, especially in the life sciences, and they confer wide-ranging protection, meaning that very few acts do not require the authorization of patent holders. Exclusive patent rights extend to multiplied seeds if they contain the patented trait. This means that peasant seeds may be covered by patent claims without peasants' knowledge if they incorporate, even unintentionally, patented components.

These issues are likely to be compounded by new genome editing technologies. The technology is less time consuming and gives access to previously inaccessible areas of the genome for manipulation. On account of this, it is expected to significantly expand plant-related patents.¹⁴⁵ An additional concern is that patents on digital sequences may extend to all biological material that contains the respective sequences and expresses their functions, including peasants' and indigenous seeds.¹⁴⁶ This would further encroach on peasants' right to maintain, control, protect and develop their own seeds.

b. Plant Variety Protection

Under the UPOV Convention, a plant variety must be new and meet the criteria of distinctiveness, uniformity and stability (DUS) to be eligible for protection. Tailored to the logic and needs of commercial plant breeders, these criteria exclude, by definition, peasants' varieties derived from traditional knowledge. Peasant selection and breeding is a collective process aimed at achieving diversity and resilience and, as such, is fundamentally at odds with the individualistic and productivist logic of PVP systems.

In many cases, PVP laws in Africa are even more stringent – that is, more favourable to commercial plant breeders – than required by the UPOV Convention, which African countries have no obligation to adopt in any case.¹⁴⁷ For example:

- Annex X of the Bangui Agreement offers exclusive protection to a plant breeder for a period of 25 years, whereas the minimum is 15 years under UPOV 78 and 20 years under UPOV 91.¹⁴⁸ In South Africa, the Plant Breeders' Rights Act (2018)

145 Michael A. Kock, "Open intellectual property models for plant innovations in the context of new breeding technologies," [Agronomy](#) 11 No. 1218 (2021): 4-5.

146 Philip Seufert, [Farmers' rights or corporate control over seeds?](#) Background paper to the ninth session of the ITPGRFA governing body (FIAN International, 2022).

147 While the provisions above are not required by the UPOV Convention, they are actively promoted by UPOV in its guidance documents. Guidance, however, is not binding.

148 [Bangui Agreement](#), Annex X, Art. 36.

- extends the period of protection to up to 30 years for some categories of plants (to be defined in the regulations).¹⁴⁹
- Both Annex X and the Arusha Protocol restrict the farmers' exception beyond what is required by UPOV 91 by excluding fruit forestry and ornamental plants (see Section C below).¹⁵⁰ The Arusha Protocol also excludes "other vegetables."¹⁵¹
 - Annex X includes a confidentiality clause, which provides that applications shall be kept secret by the OAPI Secretariat.¹⁵² This clause violates a fundamental principle of IP law by preventing the transfer of technology and knowledge after expiry of the term of protection, and goes against the public interest.¹⁵³
 - Annex X provides for criminal proceedings in cases of alleged infringement. Penalties include fines and/or imprisonment of one to six months. In Ghana, the PVP Act (2020) provides for exceptionally harsh criminal sanctions worldwide: infringement of plant breeders' IP is liable to imprisonment for a *minimum* of ten years.¹⁵⁴ Criminal sanctions, however, are disproportionate in relation to the offence. IP is private in nature, and losses of profits incurred by eventual infringement can be compensated through monetary payments. Infringement of IP shall be liable to civil remedies, not criminal sanctions. PVP laws shall also include provisions protecting farmers in cases of innocent infringement.

African PVP laws uphold the breeders' exception as defined by the UPOV Convention, ensuring free access to protected varieties for the development of new ones. However, under the 1991 Act in force in the OAPI region as well as in some African countries, PVP extend to the controversial concept of essentially derived varieties (EDV). This means that peasants need the PVP titleholder's authorization to commercialize the seeds of new populations if these are "essentially derived" from protected varieties, that is, similar in their main characteristics. The concept of EDV is problematic for two reasons. First, all new varieties are essentially derived from some combination of existing varieties, making it difficult to determine exactly when a variety stop being an EDV. Therefore, depending on how it is interpreted, this provision could restrict the breeder's exception. Second, the concept of EDV implies a double standard: it applies when a protected variety is used as the initial source of derivation, but not when a farmer's variety is the initial source of derivation.¹⁵⁵

Not only is the UPOV model inadequate in countries where the commercial seed market is marginal, evidence suggests it is also ineffective. A working paper by the Association for Plant Breeding for the Benefit of Society (APBEBES) observes that, ten years after the entry into force of Annex X of the Bangui Agreement, only 7 of OAPI's 17 members have made use of the PVP system "at great cost and at the

149 Republic of South Africa, [PBRs Act, 2018](#), Art. 8.1.

150 [Bangui Agreement](#), Annex X, Art. 33(d).

151 [Arusha Protocol](#), Art. 22.2.

152 [Bangui Agreement](#), Annex X, Art. 22.

153 Coulibaly and Brac de la Perrière, "[A dysfunctional PVP system](#)."

154 [Bangui Agreement](#), Annex X, Art. 49; Republic of Ghana, [PVP Act \(2020\)](#), Art. 60.

155 Correa, "[Plant Variety Protection](#)," 30–1.

expense of public funds."¹⁵⁶ The authors conclude that the system has not produced a meaningful increase in plant breeding activities in OAPI Member States, nor resulted in the growth of the seed industry in the sub-region. It has, however, raised alarms about the misappropriation of farmers' varieties.¹⁵⁷ Nigeria, in contrast, provides an example of a country that has a dynamic seed sector despite not having had a PVP law in place until 2021.¹⁵⁸

The African Group of countries at the WTO has consistently called for clarity on Article 27.3b of the TRIPS Agreement, stating that microbiological processes should be excluded from patentability, and that WTO members should retain flexibility in implementing sui generis regimes for plant varieties. The African Group also emphasized the need to harmonize TRIPS and the CBD, and to prevent anti-competitive rights or practices that threaten food security.¹⁵⁹

[BOX 1] IMPOSING UPOV 91 THROUGH TRADE AGREEMENTS: THE EURO-MEDITERRANEAN ASSOCIATION AGREEMENTS

As of 2022, six African countries are individually party to the 1991 Act of the UPOV Convention: Tunisia, Morocco, Tanzania, Kenya, Egypt, and Ghana.¹⁶⁰ Of these, three – Tunisia, Morocco and Egypt – have signed Euro-Mediterranean Association Agreements with the EU that require accession to UPOV 91.¹⁶¹ A fourth country, Algeria, entered into an association agreement with the EU that contains a similar provision but, as of 2022, had not yet acceded to UPOV 91. These Agreements typically state that "The Parties shall provide suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards. This shall encompass effective means of enforcing such rights."¹⁶² An annex further provides that the parties to the Agreement must accede to UPOV 91 by the end of the fourth or fifth years after the entry force of the Agreement.¹⁶³

The fact that the EU is promoting UPOV 91 through its trade agreements with coun-

156 Coulibaly and Brac de la Perrière, [A dysfunctional PVP system](#), 29–30. See, also, Adebola, "[Examining Plant Variety Protection](#)," 45.

157 Coulibaly and Brac de la Perrière, [A dysfunctional PVP system](#), 27.

158 Nigeria has over 300 seed companies. See [List of licensed seed entrepreneurs in Nigeria](#). National Agricultural Seed Council (Website), accessed 14 November 2022.

159 See Official Submission to the WTO on behalf of the African Group, [IP/C/W/163](#); [IP/C/W/206](#); [WT/GC/W/302](#); [IPC/W/404](#). See, also, [WT/L/317](#) (South Africa); [WT/GC/W/233](#) (Kenya); [IP/C/W/369/Rev.1](#) (WTO Secretariat).

160 In addition, 17 African countries are party to UPOV 91 through their membership in OAPI.

161 Fulya Batur, François Meienberg and Burghard Ilge, [Plant variety protection and UPOV 1991 in the European Union's trade policy: Rationale, effects and state of play](#) (APBEBES and Both Ends, 2021).

162 See, for example, Article 44 of the Agreement between the EU and Algeria. Official Journal of the European Union, [Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, on the one part, and the People's Democratic Republic of Algeria, of the other part](#), 2005/690/EC (2005).

163 See "[Euro-Mediterranean Agreement](#)," Annex 6.

tries of the Global South has come under severe criticism.¹⁶⁴ While the EU is a signatory to the 1991 Act, some EU Member States – namely Italy and Portugal – have chosen to remain party to the 1978 Act. In any case, the EU should not use trade pressure to push countries to adopt PVP regimes that severely restrict these countries' ability to adopt legislation that protect peasants' rights and peasant seed systems.

[BOX 2] LEGAL CHALLENGE TO NIGERIA'S PVP LAW (2021)

In Nigeria, CSOs have denounced the adoption in 2021 of a Plant Variety Protection (PVP) Act modelled on the 1991 Act of the UPOV Convention, allegedly in preparation for joining UPOV.¹⁶⁵ Importantly, Nigeria is under no obligation to adopt UPOV standards of plant variety protection or accede to UPOV pursuant to a regional IP agreement or bilateral trade and investment treaty.¹⁶⁶

The Health of Mother Earth Foundation (HOMEF), with the support of over 50 organizations, filed a lawsuit against the government of Nigeria on the grounds that some provisions of the PVP Act (2021) were inconsistent with the Nigerian Constitution.¹⁶⁷ HOMEF challenged, in particular, Section 43.2 of the Act, which would prevent anyone from appealing a decision of the Ministry of Agriculture before a court.¹⁶⁸ HOMEF also denounced the lack of proper public consultation and farmers' participation in the process of preparing the bill. Finally, HOMEF condemned some provisions of the law for discriminating against farmers and their seed systems. The PVP law severely restricts the use of farm-saved seeds and propagating materials. The "farmer's exception" (Art. 30) modelled after UPOV 91 is narrowly defined and exposes farmers to criminal sanctions for exchanging seeds from protected varieties. CSOs called on the government of Nigeria to withdraw the PVP Act and replace it with sui generis legislation adapted to its agricultural systems and in line with its international obligations, including the protection of peasants' rights.

KEY FINDINGS

Intellectual property affects peasants' right to maintain, control, protect and develop their own seeds in various ways. These property regimes neither recognize nor reward peasant innovation systems. On the contrary, they hinder peasants' breeding and selection work by limiting the use and circulation of protected traits and varieties. This is particularly problematic in a context where peasant seed systems are the main suppliers of seeds. The push for African countries to adhere to the 1991 Act of the UPOV Convention and the potential of new genome technologies to extend the reach of plant-related patents represent a direct threat to peasants' right to maintain, control, protect and develop their own seeds.

164 Charlotte Krinke, *UE – UPOV : accords commerciaux contre sécurité alimentaire* (Inf'OGM, 2022).

165 HOMEF, *Petition: Nigerians reject the UPOV-91 based plant variety protection* (2021).

166 Prime Business, *HOMEF drags FG to court over plant variety protection law* (2021).

167 FHC/ABJ/CS/815/2021, Federal High Court of Abuja.

168 Government of Nigeria, *Plant Variety Protection Act, 2021*.

2. SEED MARKETING

In the 1990s, African countries began to introduce seed marketing laws and policies in view of facilitating seed trade and the expansion of the commercial seed industry. The introduction of seed regulation has been facilitated and financed by government agencies and private organizations from the Global North such as USAID, the Syngenta Foundation¹⁶⁹ and the Alliance for a Green Revolution in Africa (AGRA).¹⁷⁰

Today, most African countries have some form of seed marketing regulation in place.¹⁷¹ In most cases, these regulations are modelled on those of European countries with an industrialized seed sector and are not adapted to African seed systems. The different economic communities – COMESA, EAC, ECOWAS and SADC – also have provisions on the harmonization of seed regulations.¹⁷² These harmonization policies usually involve the creation of a common catalogue listing the varieties authorized on the market for all countries in a given region.

Seed marketing laws establish pre-marketing requirements, such as the obligatory testing and registration of a variety in a national catalogue; the registration of suppliers and traders; seed quality criteria, for example humidity rates; seed production rules such as seed lot certification; and marketing rules, such as labelling and packaging. While seed marketing laws are distinct from IP, they are based on the same distinctiveness, uniformity and stability (DUS) criteria established for PVP protocols, and similar tests are used for both PVP applications and registration in seed catalogues. In addition, agricultural crops must demonstrate their Value for Cultivation and Use (VCU) in order to be allowed on the market.

Both sets of criteria are prohibitive for peasant seed systems.¹⁷³ DUS criteria require a degree of homogeneity and stability not found in peasants' varieties. Indeed, there is a trade-off between homogeneity/stability and adaptability/resilience. Peasant varieties are bred for genetic heterogeneity rather than homogeneity because this makes them less reliant on external inputs, more adaptable to their environment and more resilient in the face of changing conditions.

Some states, like Uganda, Tanzania and Ethiopia, provide for a simplified certification system known as Quality Declared Seeds (QDS) aimed at providing space for

169 Syngenta Foundation and New Markets Lab, *Manual on regional seed regulations in the Southern African Development Community* (2020).

170 AGRA presents itself as "an alliance led by Africans", but is funded by the Bill and Melinda Gates and Rockefeller foundations (AGRA, *Our Story*, accessed 14 December 2022). See BIBA et al. *False promises: The Alliance for a Green Revolution in Africa (AGRA)* (2020).

171 See *Access to Seeds Index* (Website), Accessed 14 December 2022.

172 ACB, *Status report on the SADC, COMESA and EAC harmonized seed trade regulations* (2018); Katrin Kuhlmann, *Harmonizing regional seed regulations in Sub-Saharan Africa: A comparative assessment* (2015). For ECOWAS, see AFSA, *Analytical mapping of legal and policy instruments and actors in seed governance in Niger* (2022); for SADC, see *Seed trade in Southern Africa: Operationalizing 15 years of policy in six years* (2022).

173 FAO/CGRFA, *Impact of implementation of seed legislation on diversity of plant genetic resources for food and agriculture*, CGRFA-18/21/12.3/Inf.1 (2021).

the participation of farmers' cooperatives as seed producers in a semi-formal seed system. However, in most cases, the quantity and geographic reach of marketing is narrowly limited and – with the exception of Ethiopia¹⁷⁴ – only varieties registered in the national catalogue can be multiplied under this scheme.¹⁷⁵ While QDS might be an option to improve access to seeds, it is insufficient to implement the right to seeds, as it only gives restricted rights to the selling of seeds and does not allow the distribution of peasants' varieties.

In most countries, seed marketing laws and policies do not include measures to foster local peasant seed varieties. The norms they establish are not adapted to the needs and realities of peasant seed systems and they create an insurmountable administrative burden for peasants. Moreover, the scope of what constitutes “marketing” is often poorly defined, resulting in peasant seed systems being subsumed under seed marketing laws. For example, the Kenyan Seed Act introduced in 2012 to ensure the quality of commercial seeds prescribes strict conditions for seed certification, and stipulates fines and jail terms for the sale of uncertified seeds. No provisions were made to exempt peasant seed systems from the scope of the law and to protect peasants from prosecution.¹⁷⁶

In recent years, there has been a strong push to harmonize seed marketing laws at the continental level.¹⁷⁷ In the context of the AfCFTA, the AU is seeking to develop continental guidelines for the harmonization of seed regulatory frameworks.¹⁷⁸ In response to a preliminary draft of these guidelines released in 2021, African CSOs denounced the submission of peasant seed systems to the logic of commercial plant breeding, and stressed that peasants' rights can only be realised by defending and strengthening peasant seed systems in their own right.¹⁷⁹

KEY FINDINGS

Existing seed marketing laws and regulations are wholly inadequate for peasant seed systems, and encroach on peasants' right to maintain, control, protect and develop their own seeds. The current drive to harmonize seed marketing laws at the national, regional and continental levels must be reconsidered in light of UNDROP Article 19.2.

174 Teshome Hunduma Mulesa et al., *Pluralistic seed system development: A path to seed security?* *Agronomy* 11, No 2 (2021), 372.

175 Farm Africa, *Quality Declared Seeds: Addressing challenges in access to quality seeds for smallholder farmers* (2022). AFSA, *Mapping seed-system policies, frameworks, mechanisms, and initiatives in Tanzania and East Africa* (2022).

176 Greenpeace, *Punitive seed laws protect big corporations over Kenya's farmers* (2022).

177 ACB, *Harmonization of seed laws in Africa. Regional and continental integration under the auspices of the African Continental Seed Harmonization (ACSH) initiative and the African Continental Free Trade Area (AfCFTA)*. Preliminary comments (2021); Munyi, “Current developments.”

178 Wobil, “Development of continental guidelines.”

179 AFSA, *African social movements demand that AU suspends undemocratic and pro-industry seed and GMO guidelines and processes* (2021). For concrete proposals, see African Centre for Biodiversity, *Towards national and regional seed policies in Africa that recognize and support farmer seed systems* (2015).

3. BIOSAFETY

The vast majority of African countries (49 out of 54) have ratified the UN Cartagena Protocol on Biosafety.¹⁸⁰ Yet the implementation of biosafety regulatory frameworks – that is, laws, regulations, guidelines and policies related to biotechnology and biosafety – is uneven among African countries.¹⁸¹ Some countries have passed biosafety legislation, but have no biotechnology and biosafety policy. Conversely, some countries have a biotechnology and biosafety policy, but no biosafety law. A 2021 report commissioned by the AU Commission concludes that very few African countries have fully operational biosafety and biotechnology frameworks, despite their ratification of the Cartagena Protocol.¹⁸²

This means that most African countries have no biosafety regulatory framework to guarantee peasants' right to maintain and control their own seeds and to protect peasant seed systems from GMO contamination. Only eleven countries have authorized field trials and/or commercial production, but contamination can also happen through importation of GM foods and food aid.¹⁸³

As part of its efforts to harmonize seed marketing laws at the continental level, the AU Commission is developing guidelines for the use of biotechnology. However, a Draft Report made public in 2021 has raised concerns among CSOs that the guidelines' emphasis is on promoting agricultural biotechnology and facilitating the release of GMOs rather than on promoting biosafety.¹⁸⁴ In response, CSOs have called to “protect peasant seed systems against the release of GMOs and hazardous new biotechnologies.”¹⁸⁵ As of 2021, only Kenya and Nigeria have published biosafety guidelines for the regulation of genome editing.¹⁸⁶

The Draft Report proposes that the AU Commission revive the African Model Law on Safety in Biotechnology adopted in 2003.¹⁸⁷ This African Model Law was developed with the active participation of African civil society. It was founded on the precautionary principle and went further than the minimum requirements set out by the Cartagena Protocol on Biosafety. In 2007, the AU revised the law – renamed African Model Law on Biosafety – and launched a 20-year African Biosafety Strat-

180 CBD, *Parties to the Cartagena Protocol*, accessed 7 June 2022.

181 See CBD, *Biosafety Clearing House*, Country profiles.

182 AUC, *Continental guidelines*, 1.

183 As of 2021, seven African countries cultivated GM crops commercially (Eswatini, Ethiopia, Kenya, Malawi, Nigeria, South Africa, and Sudan), and five had ongoing field trials (Burkina Faso, Ghana, Mozambique, Rwanda, and Uganda). AUC, *Continental guidelines*, 7.

184 As of 2020, seven African countries have authorized the commercial cultivation of GM crops (South Africa, Sudan, Eswatini, Ethiopia, Malawi, Nigeria, and Kenya). AUC, *Continental guidelines*.

185 ACB, *Harmonisation*, 9.

186 In Kenya, decisions as to whether a gene edited product falls within the mandate of the Biosafety Act's regulation will be made on a case-by-case basis by the National Biosafety Authority and are likely to be based on the presence or absence of transgenic sequences. In Nigeria, gene edited products will need to be approved by the National Biosafety Management Agency. AUC, *Continental Guidelines*, 19.

187 AUC, *Continental Guidelines*, 4. See, also, AU, *African Model Law on Safety in Biotechnology* (2003).

egy aimed at harmonizing biosafety laws and procedures on the continent.¹⁸⁸ The revised African Model Law on Biosafety retained a cautionary approach, but gave a greater role to the private sector, including regional economic communities that focus on trade and have no biosafety capacity.¹⁸⁹

When assessing risks, the African Model Law on Biosafety emphasizes the need to take into consideration potential risks to biological diversity, the environment, human health, as well as socioeconomic impacts, and not to undermine local community or indigenous knowledge and technologies (Art. 6 and 8).¹⁹⁰ The African Model Law on Biosafety provides for public awareness and participation in decision making (Art. 5)¹⁹¹; calls for mandatory labeling of GMOs and their by-products¹⁹²; and stipulates that liability for any harm caused by GMOs lies with developers and applicants (Art. 15).¹⁹³

The African Model Law on Biosafety is broadly in line with the right to seeds enshrined in UNDROP. Transposing its provisions into Member States' national legislation would represent a positive step in guaranteeing peasants' right to maintain, control, protect and develop their own seeds.

KEY FINDINGS

Despite their ratification of the Cartagena Protocol, most African countries do not have fully operational biosafety legal frameworks. The African Model Law on Biosafety, if domesticated by member states, has the potential to protect peasants' right to maintain and control their own seeds, including by protecting them against GMO contamination. This is all the more important given the new issues raised by genome editing technologies.

C. CHALLENGES TO THE RIGHTS OF PEASANTS TO SAVE, USE, EXCHANGE AND SELL FARM-MADE SEEDS AND TO ACCESS LOCALLY AVAILABLE SEEDS

The push to introduce a legal and regulatory framework designed for the industrial seed system (monoculture-based, chemical input reliant and intensive) in African countries encroaches on peasants' right to save, use, exchange and sell farm-made seeds enshrined in UNDROP (Article 19.1d), as well as on their rights to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow (Article 19.5).

¹⁸⁸ Haidee Swanby, *The revised African model law on biosafety and the African biosafety strategy* (ACB, 2009).

¹⁸⁹ Swanby, "The revised African model law," 3.

¹⁹⁰ African Model Law on Biosafety, Arts. 6 and 8.

¹⁹¹ African Model Law on Biosafety, Art. 5.

¹⁹² African Model Law on Biosafety, Art. 11.

¹⁹³ African Model Law on Biosafety, Art. 15.

1. PATENTS

Under patent law, the scope of protection extends to the propagation and multiplication of seeds by peasants. As a general rule, patent laws do not allow for saving, exchanging and selling farm-made seeds from a protected variety.

The European Union (EU) provides a notable exception: the EU Biotech Directive adopted in 1998 allows a farmer to save seeds from their harvest produced by planting a patented seed and use it for propagation or multiplication on their own farms.¹⁹⁴ Regional IP organizations and African states should consider incorporating such an exception in regional IP agreements and national patent laws. Such an exception should extend to the exchange and sale of seeds, in line with Article 19.1d of UNDROP.

[BOX 3] PEASANTS' RIGHTS IN EU PATENT PROTECTION: THE EU BIOTECH DIRECTIVE

In the European Union, the EU Biotech Directive sets out a derogation from exclusive patent rights for agricultural use of propagated material or livestock by farmers and peasants. The EU Biotech Directive states that the sale of seeds to a peasant by the patent holder for agricultural use implies an authorization to use the product of their harvest for propagation or multiplication on their own farm, subject to the same limitations as plant variety protection.¹⁹⁵ This authorization is echoed in several national patent laws, including in Austria, Croatia, Denmark, Latvia, Finland and Slovakia. However, it does not fully resolve the tensions with the right to seeds in UNDROP, since it only allows peasants the right to save and use seeds falling under patent claims on their own farms and does not permit the exchange or the sale of seeds.¹⁹⁶

As legal scholars Thamara Romero and Carlos Correa have argued, countries in the Global South "can go further [than the EU] in their laws and exclude plants in general, including but not limited to plant varieties.... They may apply their own criteria on the matter, in particular to prevent the indirect control over plant varieties on the basis of patents covering plants or their parts and components (such as gene constructs)."¹⁹⁷ Countries can, for example:

- establish that whole plants as well as biological parts and components, whether modified or not, from which a complete plant may be generated are not patentable;
- establish the non-patentability of products obtained from patented processes;

¹⁹⁴ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

¹⁹⁵ Directive 98/44/EC, Art. 11.1.

¹⁹⁶ Christophe Golay and Fulya Batur, *Practical manual on the right to seeds in Europe* (Geneva Academy 2021): 39-40.

¹⁹⁷ South Centre, *Patenting of plants and exceptions to exclusive rights: Lessons from European law* (2021): 30. See, also, OXFAM, "The status of patenting plants."

- limit the scope of patents relating to genetic information to situations where it actually performs its function in living material;
- provide immunity to farmers regarding the unintended use of patented materials;
- stipulate that farmers' rights cannot be derogated from by private contractual agreements.¹⁹⁸

2. PLANT VARIETY PROTECTION

Regional PVP laws in the OAPI and ARIPO regions confer extremely limited rights to farmers. Modelled on UPOV 91, the “farmer’s exception” only allows farmers to save seeds harvested from a protected variety for replanting on their own holding.¹⁹⁹ The Arusha PVP Protocol (adopted but not yet in force) states that the farmer’s exception extends to the list of agricultural crops and vegetables with a historical common practice of saving seed in the Contracting States, as specified by the ARIPO Administrative Council. Both the Arusha Protocol and Annex X of the Bangui Agreement do not allow a farmers’ exception for fruits, ornamentals or forest trees.²⁰⁰ These protocols incorporate the UPOV 91 provision stating that the breeders’ rights shall not extend to “acts done privately and for non-commercial purposes.”²⁰¹

These protocols also include a so-called “farmers’ privilege” as defined under UPOV 1991.²⁰² This limited exception to the breeder’s rights violate peasants’ right to seeds as enshrined in UNDROP, namely “the right to save, use, exchange, and sell their farm-saved seed or propagating material”; and “the right to maintain, control, protect and develop their own seeds and traditional knowledge” (Article 19).

In African countries that are not part of regional IP organizations, the definition of farmers’ right to seeds under PVP laws vary greatly. Some countries have adopted some UPOV 91 standards in their domestic legislation even if they are under no obligation to do so. This is the case, for example, of both South Africa (party to the 1978 Act) and Nigeria (Nigeria is not a party to UPOV but has initiated accession procedures).²⁰³ In contrast, Ethiopia’s PVP law (2017) provides for a much broader

198 OXFAM, “The status of patenting plants,” 21; and South Centre, “Patenting of plants,” 30.

199 Article 22.2 of the [Arusha Protocol](#) and Article 33 of Annex X of the [Bangui Agreement](#).

200 [Arusha Protocol](#), Article 22.2.; [Bangui Agreement](#), Art. 33. This limitation is not a requirement of UPOV 91 but follows UPOV guidance, which is not binding.

201 As of 2022, discussions are ongoing at UPOV as to what constitutes “acts done privately and for non-commercial purposes.” See UPOV, [Working group on guidance concerning smallholder farmers in relation to private and non-commercial use](#), WG-SHF/1/3 (2022).

202 UPOV guidance favours a restrictive interpretation of the scope of this provision. See [Explanatory notes on exceptions to the breeders’ right under the 1991 Act of the UPOV Convention](#), UPOV/EXN/EXC/1 (2009), 8–11. For an analysis of this provision, see Sangeeta Shashikant and François Meienberg, International contradictions on farmers’ rights (TWN and Berne Declaration, 2015): 9.

203 Peschard, “Searching for flexibility,” 24–5. Titilayo Adebola, [Can the subaltern speak? Nigeria’s un-toward path to UPOV](#) (2020).

protection of peasants’ right to seeds: smallholder farmers and pastoral communities have the right to save, use, exchange and sell farm saved seed of any variety on the non commercial market (see Box 4).

3. SEED MARKETING

Under seed marketing laws, variety registration and seed certification often become a precondition for bringing seeds into circulation. In many African countries and regional blocks, this includes gifting, exchanging and selling seeds among farmers. In the ECOWAS region, for example, “marketing means the sale, conservation for the purpose of sale, sale offer and any form of cession, supply or transfer for the purpose of commercial transaction, of seeds or plants with or without remuneration.”²⁰⁴ By extension, varieties that do not meet these criteria are considered illegal, and peasants practicing their customary right to give, exchange and sell farm saved seeds might face criminal charges, in a clear violation of farmers’ and peasants’ right to seeds under the Plant Treaty and UNDROP.

KEY FINDINGS

Current laws governing seeds at the national and regional level neither recognize nor support peasants’ right to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow. On the contrary, seed and IP laws and policies burden, and in some cases outlaw, the saving, use, exchange and sale of farm-saved seeds. They also restrict the diversity of locally adapted seeds that can be accessed by peasants on the market, by imposing strict certification rules for seed production, and by using DUS and VCU criteria to grant access to the seed market. Overall, seed marketing and IP laws neglect and disregard the rights, needs and interests of peasants.

[BOX 4] PROTECTING PEASANTS’ RIGHTS: ETHIOPIA’S PVP PROCLAMATION (2017)

Ethiopia’s PVP law was first adopted in 2006 and revised in 2017. Similar to India’s PPVFR Act, the 2006 law conferred extensive rights to farmers to save, use, multiply, exchange and sell farm-saved seeds or propagating material from protected varieties, with the only limitation that they could not sell them in the seed industry as certified seed (Article 28).²⁰⁵

When the PVP law was revised in 2017, the farmers’ rights provision was amended. Under the revised law, smallholder farmers and pastoral communities (as opposed to “farmers” previously) “shall have the right to save, use, exchange and sell farm sa-

204 See [C/REG.4/05/2008 on the harmonization of rules governing quality control, certification and marketing of plant seeds and seedlings in ECOWAS region](#) (2008), Art.1.

205 A Proclamation to Provide for Plant Breeders’ Right in Ethiopia, [Proclamation No. 481/2006](#), Arts. 6 and 28.

ved seed of any variety on the non commercial [market]”.²⁰⁶ In addition, “any farmer or pastoral community shall have the right to save and use farm-saved seed of any variety of food crops and other species that directly [supports their] livelihoods.”²⁰⁷ The non-commercial market is defined as any trade in seed conducted between small holder farmers, pastoral communities and their cooperative societies.²⁰⁸ This is in line with UNDROP, which defines peasants’ rights as the individual and collective rights of smallholders and pastoral communities.

The government of Ethiopia is committed to implementing farmers’/peasants’ rights, and does not intend to join UPOV.²⁰⁹

[BOX 5] PEASANTS’ RIGHT TO SEEDS IN SOUTH AFRICA

In 2015, South Africa embarked upon the revision of its seed and PVP legislation, resulting in the passing of the Plant Improvement Act, 2018 (PIA) and Plant Breeders’ Rights (PBRs) Act, 2018. By and large, these laws are geared to the interests of the commercial seed industry. However, the active engagement of civil society ensured that significant exceptions for peasants’ rights were made in the draft regulations of both acts.

Under the PIA Act and its Regulations, peasants have the right to save, reuse, exchange, and sell all seed and propagating material of unprotected varieties as long as these do not exceed certain quantities. This approach distinguishes between categories of farmers (household, subsistence, smallholder and commercial), thresholds for quantities of seed produced, and commercial versus non-commercial use.²¹⁰ A similar approach is taken in the PBRs Act and its Regulations, whereby the right to reuse and produce a protected variety is defined based on the categories of farmers and of plants.²¹¹

While these exceptions do not constitute a legal framework for peasant seed systems, they go some way towards recognition of the right to seeds.²¹² These exceptions open regulatory spaces to promote an approach to peasant seed systems that integrates climate change adaptation and mitigation, agroecology, agricultural biodiversity, the conservation and sustainable use of biodiversity, and the full implementation of peasants’ rights in line with UNDROP.²¹³

206 Proclamation No. 1068/2017, Art. 7.1. “Smallholder farmers or pastoral communities” are defined as those whose livelihoods depend predominantly on agriculture, who use family labor, and own 10 ha of land or less (Art. 2.15).

207 Proclamation No. 1068/2017, Art. 7.2.

208 Proclamation No. 1068/2017, Art. 2.4.

209 Mulesa and Westengen, “Against the grain?”, *JWIPR* 23 (2020), 96.

210 See Section 23 of the PIA Act (2018), read together with draft Regulations 5.

211 See Section 10 of the PBRs Act (2018), read together with draft Regulations 5.

212 ACB, *Breaking from the rest of the continent. South Africa moves towards recognizing smallholder farmers’ right to seed and farmer seed systems – but the road ahead is still long* (2022).

213 Mariam Mayet, “Keynote: South Africa’s move to recognize smallholder farmers’ rights to seeds,” International dimensions of the EU Seed Marketing Reform (Webinar), Brot für die Welt and HEKS EPER, 7 December 2022.

At the international level, South Africa is party to the 1978 Act of the UPOV Convention, to the CBD and to the Nagoya Protocol, but not the Plant Treaty. South Africa has been a strong advocate of UNDROP during its negotiation and voted in favour of its adoption.

D. CHALLENGES TO THE RIGHTS TO THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TO EQUITABLE BENEFIT SHARING

In contrast to the protection given to IP, the elements of the right to seeds that relate to traditional knowledge and benefit sharing are poorly protected in African laws and regulations. All African Member States are party to the Convention on Biological Diversity (CBD)²¹⁴, and the vast majority have ratified the Nagoya Protocol.²¹⁵ In addition, 42 African countries out of 54 are parties to the Plant Treaty.²¹⁶ However, the implementation of these treaties remains ineffective to protect the rights enshrined in UNDROP, and most peasants remain uncompensated for their essential contribution to the maintenance and improvement of agrobiodiversity.²¹⁷

1. PROTECTION OF TRADITIONAL KNOWLEDGE AND ACCESS AND BENEFIT SHARING

In the ARIPO region, traditional knowledge is protected under the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.²¹⁸ The protocol, adopted in 2010, came into force in 2015. The preamble states the desire “to preclude the grant and exercise of improper intellectual property rights in traditional knowledge, associated genetic resources and derivatives thereof.” The broad definition of traditional knowledge (TK) adopted by the Protocol encompasses peasants’ knowledge for preserving and breeding seeds as well as other agricultural techniques.²¹⁹ The Protocol provides protection to TK if it is “(i) generated, preserved and transmitted in a traditional and intergenerational context; (ii) distinctively associated with a local or traditional community; and (iii) integral to

214 See CBD, *List of parties*.

215 The exceptions are Equatorial Guinea, Libya and South Sudan, which are not signatories to the Nagoya Protocol; and Algeria and Somalia, which have signed, but not yet ratified, the Nagoya Protocol. See Nagoya Protocol, *List of parties*.

216 In addition, two countries – Cabo Verde and Nigeria – are signatories to the Plant Treaty but have not yet ratified it. Only five – Botswana, Comoros, Equatorial Guinea, Gambia and South Africa – are not signatories. See Plant Treaty, *List of contracting parties*.

217 De Schutter, “Seed Policies,” §47.

218 ARIPO, *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (2010).

219 The Swakopmund Protocol defines traditional knowledge as “any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources” (Section 2.1).

the cultural identity of a local or traditional community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility.”²²⁰ The Protocol grants TK owners the exclusive right to exploit and/or authorize the exploitation of their TK on the basis of their prior informed consent.²²¹ It makes provision for the fair and equitable sharing of benefits arising from the commercial or industrial use of TK based on the mutual agreement between TK holders and users.²²²

The OAPI also has the protection of TK as one of its objectives under the Bangui Agreement.²²³ In 2007, OAPI adopted the *Instrument africain relatif à la protection des savoirs traditionnels*.²²⁴ This instrument is similar to ARIPO’s Swakopmund Protocol, except that the protection of folkloric expressions is regulated in a different instrument. This regional instrument stipulates that access to and exploitation of TK should be based on the prior informed consent of local communities. Furthermore, local communities are entitled to benefit from the exploitation of the TK which they have authorized access to.

As of 2020, 21 African countries had legislative, administrative or policy measures on access and benefit sharing (ABS).²²⁵ Some countries – for example, Ethiopia, South Africa and Zambia – have passed standalone national legislation for the protection of TK and ABS.²²⁶ South Africa also amended its Intellectual Property Act in 2013 “to provide for the recognition and protection of certain manifestations of indigenous knowledge as a species of intellectual property.”²²⁷

2. DISCLOSURE OF ORIGIN

An important roadblock to the protection of peasants’ traditional knowledge is the disjuncture between ABS and IP regimes. The African Group of countries at the WTO has consistently defended the obligation to disclose the origin of genetic resources in patent applications in international forums such as WTO and WIPO. Among the African countries that have incorporated disclosure of origin requirements in their patent laws are Burundi, Djibouti, Egypt, Namibia, South Africa,

220 [Swakopmund Protocol](#), Section 4.

221 [Swakopmund Protocol](#), Section 7.

222 [Swakopmund Protocol](#), Section 9.

223 [Bangui Agreement](#), Art. 2.

224 Munyi et al., “[A gap analysis report](#),” 45-6.

225 Based on data from the [CBD Access and Benefit Sharing Clearing-House](#). See Adebola, “[Mapping](#),” 244.

226 Federal Democratic Republic of Ethiopia, A Proclamation to provide for access to genetic resources and community knowledge and community rights, [Proclamation no. 482/2006](#); Republic of South Africa, [Protection, promotion, development and management of Indigenous knowledge Act](#), 2019; Republic of Zambia, [The protection of traditional knowledge, genetic resources and expressions of folklore Act](#), 2016.

227 Republic of South Africa, [Intellectual Property Amendment Act, 2013](#).

Uganda and Zambia.²²⁸ Yet the majority of countries lack adequate mechanisms and safeguards against the misappropriation of genetic resources and associated traditional knowledge in both PVP and patent applications.²²⁹ One well-documented example is the patent granted by the European Patent Office to a Dutch company on a process for milling and storing teff flour, which was subsequently revoked for lack of novelty and inventiveness. Teff is a traditional staple crop in Ethiopia and Eritrea, and is central to the region’s culture and identity.²³⁰

When it comes to PVP, a case of misappropriation of a traditional onion variety has been documented in the OAPI region. In 2006 the French seed company Technisem claimed intellectual property for “Violet de Galmi” a popular onion variety from Niger. In this case, famers’ organisations discovered the misappropriation because PVP was claimed under the variety’s traditional name. They informed the Government of Niger, which challenged the claim. As a result, OAPI refused to grant Technisem a PVP certificate under the name “Violet de Galmi.” However, in a blatant illustration of the inadequacy of current regulations in preventing the misappropriation of peasants’ varieties and traditional knowledge, a subsequent PVP application for the same variety was granted in 2015, this time under a different name (Violet de Damani).²³¹

In fact, UPOV explicitly prohibits the inclusion of disclosure of origins and prior informed consent provisions in the PVP laws of its members as a precondition for granting a plant variety protection certificate.²³² Hence, Annex X of the Bangui Agreement does not include an obligation to disclose the origin of the genetic material used in the development of a plant variety. Moreover, the confidentiality clause under Annex X – which means that applications are not publicly available – facilitates the misappropriation of genetic resources.²³³

The draft PVP Protocol under development by the Southern African Development Community (SADC) did not initially include any obligation to disclose the origin of the material used in the development of plant varieties. At the demand of the Alliance for Food Sovereignty in Africa (AFSA), governments agreed to include a requirement in the application to declare that the genetic material used for developing the variety has been lawfully acquired.²³⁴

228 WIPO, [Key questions on patent disclosure requirements for genetic resources and traditional knowledge](#), Annex, Disclosure requirements table, 2020.

229 Jorge Cabrera Medaglia, Chidi Oguamanam, Olivier Rukundo and Frederic Perron-Welch, [Comparative study of the Nagoya Protocol, the Plant Treaty and the UPOV Convention: The interface of Access and benefit sharing and plant variety protection](#) (CISLDL, 2019).

230 For an in-depth analysis of this case, see Regine Andersen and Tone Winge, [The access and benefit sharing agreement on teff genetic resources. Facts and lessons](#), FNI Report 6/2012 (2012).

231 Coulibaly and Brac de la Perrière, “[A dysfunctional PVP system](#),” 27.

232 See UPOV, [Guidance for the preparation of laws based on the 1991 Act of the UPOV Convention](#), UPOV/INF/6/5 (2017), 33-4.

233 Coulibaly and Brac de la Perrière, “[A dysfunctional PVP system](#),” 19.

234 Peschard, “[Searching for flexibility](#),” 25.

3. DIGITAL SEQUENCE INFORMATION

The CBD and the Plant Treaty adopt distinct approaches to access and benefit sharing (ABS). Under the CBD, bilateral contracts are negotiated between the provider and the user of a genetic resource in accordance with the national legislation implementing the CBD. The CBD has not triggered significant benefit sharing, and there is a growing consensus on the need to move beyond its bilateral and transactional logic.²³⁵ At the 15th meeting of the Conference of the Parties to the Convention on Biological Diversity held in December 2022, it was decided to establish, as part of the post-2020 global biodiversity framework, a multilateral mechanism for benefit-sharing from the use of digital sequence information on genetic resources, including a global fund.²³⁶

In contrast to the CBD approach, the Plant Treaty creates a multilateral system for facilitated access to PGRFA, and equitable benefit-sharing. Material available under the multilateral system is accessed through the Standard Material Transfer Agreement (SMTA) that specifies the rights and obligations of each party, and establishes conditions for monetary and non-monetary benefit sharing. Peasants' and farmers' seeds have been collected by gene banks and widely circulated to breeders through the SMTA. However, similarly to the CBD, it has not triggered the desired influx of financial resources. Controversial discussions on the revision of the multilateral ABS system have been going on for a decade, to no avail.²³⁷

Meanwhile, technological advances in the sequencing of plants have created new challenges for ABS regimes and threatens to jeopardize the fragile gains made in the protection of farmers' rights.²³⁸ The ability to “dematerialize” plant genetic resources and store them in large databases has opened a debate over the inclusion of the informational components of crop genetic resources in a system designed for their physical components. The African Group has played a leading role in negotiations on the issue in the context of the Plant Treaty, and insists that “failure to include DSI [Digital Sequence Information] in the multilateral system would stall the deal as genetic material includes genetic information and sequencing, and Africa cannot agree to a system that will be unfit for purpose in the near future.”²³⁹ Others caution that DSI is unlikely to benefit farmers, and that what is needed is a move away from IP and “payment for access” toward an approach based on stewardship, farmers' rights and open source science.²⁴⁰

235 Rachel Wynberg et al., *Farmers' rights and digital sequence information: Crisis or opportunity to reclaim stewardship over agrobiodiversity?* *Frontiers in Plant Science* 12 (2021).

236 For more details on the resolution, see CBD, *Digital sequence information on genetic resources*. Draft decision submitted by the president (2022).

237 Elsa Tsioumani, *ITPGRFA GB-8: A missed opportunity for multilateralism*, *Environmental Law and Policy* 49, No 6 (2019), 320-3.

238 See ACB, *Genome editing. New waves of false corporate solutions for Africa's food systems* (2021).

239 Cited in Wynberg et al., *Farmers' rights and digital sequence information*, *Frontiers in Plant Science* 12 (2021).

240 Wynberg et al., “Farmers' rights and digital sequence information.”

[BOX 6] THE REGULATION OF DSI IN AFRICA²⁴¹

As of 2020, six African countries out of 16 countries worldwide had legal, administrative or policy measures in place concerning DSI. They are Kenya, Malawi, Mozambique, Namibia, South Africa and Uganda. Similar to ABS, the approach adopted, and the nature of the measures adopted, vary greatly. As Titilayo Adebola and Daniele Manzella summarize:

“Some have set forth a specific definition catering for DSI (e.g., Namibia) while others have interpreted existing terminology to include DSI (e.g., South Africa). Some countries (e.g., Namibia) address DSI in permits and contracts for genetic resources. Others (e.g., Kenya) impose requirements for accessing DSI independently from access to genetic resources. Others again do not regulate access, which then remains open in the data repositories, but trigger benefit sharing in conjunction with certain uses of DSI (e.g., South Africa).”²⁴²

In addition, as of 2020, another 12 African countries were in the process of developing or had plans to introduce domestic measures related to DSI.²⁴³ For example, in Cameroon, a Ministerial decision passed in November 2020 stipulates that the “use of genetic information” is considered as an activity relating to the use of genetic resources and is therefore subject to requirement in matters of prior and informed consent (PIC), and to agreement on mutually and agreed terms (MAT).

4. LINKING INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND ACCESS AND BENEFIT SHARING

The African Model Law represents one of the few attempts worldwide at developing a legal instrument that comprehensively addresses international obligations in the area of IP, the protection of traditional knowledge and ABS in a single instrument. In 2012, the AU commissioned a gap analysis report on how to adapt the African Model Law to take into account important developments, including the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the Nagoya Protocol).²⁴⁴ In 2015, the AU Commission published strategic guidelines on the implementation of the Nagoya Protocol.²⁴⁵

241 The information in this box draws on: Titilayo Adebola and Daniele Manzella, *Access and benefit sharing and digital sequence information in Africa: A critical analysis of contemporary concerns in regional governance*. In Charles Lawson, Michelle Rourke and Fran Humphries, eds. *Access and benefit sharing of genetic resources, information and traditional knowledge* (Routledge, 2023).

242 Adebola and Manzella, “Access and benefit sharing,” pp. 163-4.

243 The countries are: Burundi, Cameroon, Ethiopia, Gambia, Guinea, Guinea-Bissau, Libya, Madagascar, Rwanda, Senegal, Sudan and Togo.

244 Munyi et al., “A gap analysis report.”

245 AU Commission, “Strategic guidelines.”

Read together with the Gap Analysis Report and the ABS Strategic Guidelines, the Model Law offers guidance to African countries that seek to develop their own sui generis legislation. Countries that have passed standalone legislation – such as Ethiopia²⁴⁶ and Zambia²⁴⁷, can also provide inspiration.

The African Model Law was designed to assist African member states in the implementation of their international obligations under the CBD.²⁴⁸ It proposes a sui generis approach for the protection of traditional knowledge related to biodiversity and rules on the issue of ABS. The Model Law recognizes that communities have collective rights as legitimate custodians and users of biological resources, and their right to collectively benefit from the use of their biological resources and the utilization of their innovations, practices, knowledge and technologies.²⁴⁹ The Model Law further provides that farmers' rights include the right to protect traditional knowledge relevant to plant and animal genetic resources.²⁵⁰

The pitfalls in implementing ABS regimes and the new challenges created by digital sequence information are prompting the search for alternative approaches for the realization of rights related to traditional knowledge and ABS. One promising pathway consists in explicitly rejecting IP in favour of an approach predicated on stewardship, farmers' rights and open-source science.²⁵¹

[BOX 7] STEPS TOWARDS THE HARMONIZATION OF IP AND ABS IN ETHIOPIA

Ethiopia is a crop diversity hotspot and a country where the overwhelming majority of farmers are smallholders. Ethiopia's legislation is unique in that it attempts to resolve the contradictions between IPR and ABS in international legal regimes and to provide safeguards for the realization of peasants' right to seeds. Ethiopia has observer status at the WTO and is negotiating its accession. However, it has no intention of becoming a party to UPOV.²⁵² Instead, it has developed sui generis legislation on the rights of communities, farmers and breeders that draws on the African Model Law, as well as on the CBD and Plant Treaty.

246 A Proclamation to provide for access to genetic resources and community knowledge and community rights. Proclamation No. 482/2006.

247 The Protection of Traditional Knowledge, Genetic Resources and Expressions of Folklore Act, 2016. Act No. 16 of 2016.

248 OAU, "African Model Legislation."

249 OAU, "African Model Legislation," Art. 16.

250 OAU, "African Model Legislation," Art. 26.1a.

251 See Wynberg et al., "Farmers' rights and digital sequence information" See, also, Joseph Henry Vogel, Manual Ruiz Muller, Klaus Angerer, and Christopher May, *Movement forward on ABS for the Convention on Biological Diversity: Bounded openness over natural information* (South Centre, 2022).

252 Mulesa and Westengen, "Against the grain," 96.

In 2006, the Ethiopian government issued two pieces of legislations: a Proclamation on Plant Breeders' Rights (PBRs)²⁵³, and a Proclamation on Access to Genetic Resources, Community Knowledge and Community Rights.²⁵⁴

The ABS Proclamation recognizes the collective rights of local communities over their genetic resources and community knowledge. It provides for the right to provide prior informed consent, and for the right to benefit sharing. To this end, the ABS Proclamation requires commercial plant breeders to disclose the origin of genetic material in their applications. Importantly, the PBRs legislation makes proof of access in accordance with the provisions of the ABS legislation a precondition for the grant of a plant variety certificate. However, the patent legislation does not include a similar disclosure requirement for the grant of a patent.²⁵⁵

In 2013, the Ethiopian government issued a Proclamation on Seed to regulate the commercial seed sector, including variety release, certification and other requirements. The proclamation explicitly excludes from its scope the use of farm-saved seed, and the exchange or sale of farm-saved seed among smallholder farmers or agro-pastoralists.²⁵⁶ Such legal safeguards are important, but they must be accompanied by public policies that support peasant seed systems. Indeed, even when a positive legal framework is in place, public policies that promote IP-protected, certified seeds can undermine peasant seed systems.²⁵⁷

KEY FINDINGS

Existing national, regional and international instruments in the area of the protection of traditional knowledge and benefit sharing are insufficient to adequately protect peasants' seed systems and knowledge, as required by UNDROP. The disjuncture between IP laws, on the one hand, and legislations on the protection of traditional knowledge and ABS, on the other, is highly problematic. A comprehensive and integrated approach is needed if the UNDROP provisions related to traditional knowledge and ABS are to be fully implemented. The governance void in the regulation of Digital Sequence Information poses a direct threat to the realization of peasants' right to the protection of traditional knowledge and ABS.

253 A Proclamation to provide for plant breeders' rights. Proclamation No. 481/2006. Revised in 2017.

254 A Proclamation to provide for access to genetic resources and community knowledge and community rights. Proclamation No. 482/2006.

255 A Proclamation on Inventions, Minor Inventions and Industrial Designs, Proclamation No. 123/1995.

256 A Proclamation on Seed. Proclamation No. 782/2013, Art. 3.2. See, also, *Views, experiences and best practices as an example of possible options for the national implementation of Article 9 of the International Treaty*, Submission by African Centre for Biodiversity to the FAO ITPGRFA (2021).

257 AFSA and GRAIN, *Resisting corporate takeover of African seed systems and building farmer managed seed systems for food sovereignty in Africa* (2018), 14.

E. CHALLENGES TO THE RIGHT TO PARTICIPATE IN DECISION-MAKING ON MATTERS RELATING TO SEEDS

The spaces, mechanisms and resources available for peasants and their representatives to participate in decision making on issues that directly impact peasants' rights vary from country to country, but are overall inadequate. Conversely, external actors – governmental agencies (e.g., USAID, USPTO), intergovernmental organizations (e.g., EU, WIPO, UPOV) and private foundations (Gates Foundation, AGRA) – exert undue influence, and “subtly or overtly influence IP law and policy at the regional and national levels in Africa.”²⁵⁸

Of particular concern is the deliberate exclusion of peasants and their organizations from participation in key meetings and processes that have a direct impact on their rights and livelihoods. AFSA has voiced concerns about the exclusion of African civil society and peasant organizations from the negotiations of a number of important regional policy instruments. In the case of the Arusha Protocol, for instance: “Despite AFSA’s well-established track record of constructive engagement with ARIPO on the Draft ARIPO PVP Protocol, and despite it being a Pan African network of African regional farmers and NGOs, working with millions of African farmers and consumers, AFSA was purposely excluded from the Arusha deliberations.”²⁵⁹ In an open letter to UPOV, AFSA denounced the AU’s failure to make these processes transparent, open and inclusive in spite of civil society’s active effort to engage.²⁶⁰ Peasant organizations were also excluded from the development of Annex X of the Bangui Agreement.²⁶¹

The same set of issues plague the ongoing development of the continental guidelines on the use of biotechnology and on the harmonization of seed regulatory frameworks. Both sets of guidelines, and their respective draft reports, were prepared behind closed doors by the AU and industry without the participation of African civil society and peasant organizations, and only belatedly opened for public consultation.²⁶²

Comparative research shows that when farmers’ organizations have the opportunity to meaningfully engage in political processes around plant variety protection, as was the case in Ecuador and Norway, the outcome is almost invariably the rejection of stringent IP norms modelled on UPOV 1991.²⁶³ Benin is yet another ex-

258 Adebola, “Mapping,” 276.

259 Quoted in: Glyn Moody, “African nations agree to plant variety treaty; Traditional farmers’ group shut out from negotiations” (Techdirt, 2015). See, also, Chee Yoke Ling and Barbara Adams, *Farmers’ right to participate in decision-making: Implementing Article 9.2(c) of the International Treaty on Plant Genetic Resources for Food and Agriculture* (APBREBES, 2016), 22-4.

260 AFSA, *Open letter to ARIPO’s statement to the International Union for the Protection of New Varieties of Plants (UPOV)* (2016).

261 Coulibaly and Brac de la Perrière, “A dysfunctional PVP system,” 28, 32.

262 AFSA, “African social movements demand that AU suspends undemocratic and pro-industry seed and GMO guidelines and processes,” Press release (2021).

263 Peschard, “Searching for flexibility,” 27.

ample. As a least developed country, it is under no obligation to implement TRIPS Article 27.3b until 2034, and yet the country is indirectly party to UPOV 91 since 2014 through its membership in OAPI. However, the government move to ratify UPOV 91 in 2017 was blocked by opposition from farmers and CSOs, who are concerned about the impact this would have on peasant seed systems.²⁶⁴ These examples beg the question of whether UPOV 91 can be adopted if peasants’ right to participation – enshrined in UNDROP as well as in other international agreements and instruments such as the Plant Treaty – is fulfilled.

The African Model law (2000) gives primacy to the participation of farmers and local communities in decision making, especially women, who have played a key role in the development and conservation of biological resources, including seeds.²⁶⁵ Provisions on participation were strengthened with the 2007 revision of the Model Law on Biosafety.²⁶⁶ The provisions of the African Model Laws related to the right to participation echo the corresponding UNDROP provisions on the right to active and free participation (Art. 10), the right to information (Art. 11) and the right to participate in decision making (Art. 19).

[BOX 8] REALIZING THE RIGHT TO PARTICIPATION: THE SEED, NORMS AND PEASANTS PROCESS IN MALI

Mali provides an example of what can be achieved when peasants and their organizations have the opportunity to engage in participatory processes. Since 2016, Malian peasant organizations and allied NGOs have been involved in the Seeds, Norms and Peasants process aimed at achieving legal recognition for peasant seeds systems. Despite initial disagreements over seed regulatory issues among the different actors involved, they have converged, through their active participation in this democratic space, toward framing the right to seed as a collective right, grounded in customary regimes for the governance of land and natural resources. They have since engaged with the state to push for legal reform to this effect, including the official recognition of peasant seed systems in the law.²⁶⁷

KEY FINDINGS

The AU, African regional IP organizations, and most African countries do not provide adequate opportunities for peasants and their organizations to participate in decision-making processes. Peasants’ organizations are often excluded from participating in major meetings and consultations processes in matters that directly affect their rights. African countries need to raise awareness of peasants’ right to fully participate in de-

264 Aziz Badarou, *Protection des obtentions végétales au Bénin: Positions tranchées entre organisations paysannes et gouvernement*, *Matin Libre* (2019).

265 OAU, “African Model Legislation,” Preamble, Objectives, and Art. 26.1c.

266 Swanby, “The revised African Model Law,” 7.

267 Mohamed Coulibaly, Priscilla Claeys, and Anne Berson, “The right to seeds and legal mobilization for the protection of peasant seed systems in Mali,” *Journal of Human Rights Practice* 12, No. 3 (2020), 479-500.

cision-making; give them formal seating in consultative groups, organize feedback mechanisms and include them in stakeholder consultations. Crucially, peasants' organizations need more support to effectively participate in these processes, especially compared to other stakeholders.

[BOX 9] CHALLENGING THE CONSTITUTIONALITY OF GHANA'S UPOV-COMPLIANT PVP ACT

In 2020, Ghana adopted a revised Plant Variety Protection (PVP) Act modelled on UPOV 1991.²⁶⁸ The UPOV Council deemed the PVP Act in conformity with the 1991 Act, opening the way to Ghana's accession in November 2021.²⁶⁹ The same month, Food Sovereignty Ghana (FSG), a CSO that had been resisting efforts to move toward UPOV 91 since 2013, challenged the constitutionality of the PVP Act in the Supreme Court of Ghana.²⁷⁰ Indeed, Ghana was not a member of UPOV at the time the PVP Act was passed in 2020. Since there was no parliamentary ratification or resolution made for Ghana's obligations under the UPOV regime, FSG argued that the coming into force of the PVP Act was unconstitutional.²⁷¹ On the other hand, the Act did not take into consideration related international conventions and human rights instruments which Ghana had ratified or adopted, such as the CBD, the Plant Treaty, and UNDROP.²⁷² More specifically, FSG denounced the Act as weakening peasant seed systems and as infringing on the right of farmers to freely save, use, exchange, and sell farm-saved seed and other propagating material.²⁷³ FSG also argued that the Act violated farmers'/peasants' right to participate in decision-making – a right enshrined in the Plant Treaty and UNDROP – since they were not represented on the Plant Breeders Technical Committee.²⁷⁴ The Act did not include any provisions to protect against biopiracy and to provide for access and benefit sharing, as required under the CBD and Nagoya Protocol.²⁷⁵ Finally, FSG denounced the fact that the Act provided for extremely harsh punishments: infringement became liable on summary conviction to high fines and to a term of imprisonment of no less than 10 years and up to 15 years.²⁷⁶ As a result, FSG asked the Supreme Court to declare the PVP Act 2021 unconstitutional and void. At the time of publication, the Supreme Court of Ghana had not yet delivered a decision in the case.

268 Republic of Ghana, [Plant Variety Protection Act, 2020](#).

269 UPOV, [Press release 131](#) (2021). As in the case of ARIPO, whether the law was indeed in conformity with UPOV 91 has been contested. See [Reply by APBEBES to Circular E-21/077](#) (2021).

270 Food Sovereignty Ghana (FSG), [Writ petition](#) in the Supreme Court, filed 11 November 2021.

271 See Republic of Ghana, [PVP Act, 2020](#), Arts. 61 and 63; and FSG, [Writ petition](#), §11.

272 FSG, [Writ petition](#), §§ 22 and 26.

273 FSG, [Writ petition](#), §§ 17 and 28-32.

274 FSG, [Writ petition](#), § 27.

275 FSG, [Writ petition](#), §§ 33-34.

276 FSG, [Writ petition](#), § 44.

5. AFRICAN STATES' OBLIGATIONS FOR THE IMPLEMENTATION OF UNDROP

This Section situates the states' obligations outlined in Section 3E above in the African context, highlighting some of the changes required for the implementation of the right to seeds in Africa.

A. OBLIGATION TO ENSURE THE CONSISTENCY OF INTERNATIONAL AGREEMENTS, AND NATIONAL AND REGIONAL LAWS AND POLICIES, WITH THE RIGHT TO SEEDS

As we have seen in Section 3B, international human rights instruments take precedence in the hierarchy of norms over other international instruments. In light of this, African states shall ensure that peasants' right to seeds is not infringed, but respected, protected and fulfilled, when interpreting and implementing the international obligations they have already undertaken, including at WTO, WIPO and UPOV, and when elaborating new regional instruments. In doing so, they shall consult and cooperate in good faith with peasants, through their own organizations, before adopting and implementing international and regional agreements that may affect their right to seeds.

Given that the UPOV Convention does not allow for the full implementation of peasants' rights, African states that have acceded to the 1991 Act, either directly or through their membership in OAPI, shall consider revoking their ratification. Countries that are signatory to the 1978 Act should not accede to the 1991 Act. Countries that are not yet members of UPOV should not seek membership in order to take advantage of the option, under the TRIPS Agreement, to develop their own sui generis PVP systems. The AU should consider proposing that the UPOV Council reopen the UPOV Convention for revision in light of the evolution of environmental and human rights law in the three decades since the UPOV Convention was last revised. A revised Act of the UPOV Convention should conform to the CBD and its Nagoya Protocol, the Plant Treaty, UNDRIP and UNDROP.

African states and regional organizations shall also ensure that the trade agreements previously signed or under negotiation do not lead to violations of peasants' right to seeds. This implies that they shall not accede to request to adhere to the 1991 Act of the UPOV Convention as part of trade and investment agreements.

National and regional laws and policies that restrict the exercise of the right to seeds shall be amended to ensure consistency with the right to seeds in interna-

tional law. Mechanisms should be established to ensure the coherence of the AU and national agricultural, economic, social, cultural and development policies with the realization of the right to seeds, including actively protecting and supporting peasants' right to seeds and seed systems. African laws and regulations relating to IP and seed marketing, and biodiversity conservation policies, shall respect and take into account the rights, needs and realities of peasants. Peasants' rights to save, use and exchange seeds shall not be disproportionately hampered by plant health requirements.

B. OBLIGATION TO RESPECT, PROTECT AND FULFIL THE RIGHT TO SEEDS

In UNDROP, the right to seeds includes States' obligation to avoid creating obstacles to peasant seed systems, which means for instance that they shall not adopt policies and regulations on seed marketing that impose stringent requirements as a precondition for the exchange or sale of peasants' seeds. States that have regulations governing variety testing and registration, and seed production, certification and trade, shall ensure that the scope of these regulations is limited to certified seeds and does not include peasants' seeds.

The AU and African states shall take all necessary measures to ensure that non-state actors respect and strengthen the right to seeds. States shall address the detrimental impacts that plant-related patents have on peasants' capacity to source seeds and breeding material freely to develop varieties and populations adapted to their local conditions and social needs.

States shall also prevent the risks arising from the development, handling, transport, use, transfer or release of living modified organisms, which requires a precautionary approach in the implementation of biosafety legislation.

Finally, states shall recognize peasants' role in the conservation, sustainable use and management of crop diversity, and adequately compensate them for its maintenance and adaptation in a multi-layered African strategy on genetic resources.

C. OBLIGATIONS TO SUPPORT PEASANT SEED SYSTEMS AND TO PROMOTE THE USE OF PEASANTS' SEEDS AND AGROBIODIVERSITY

The obligations to support peasant seed systems and to promote the use of peasants' seeds entail the development of normative frameworks that allow peasant seed systems to exist, fully operate and thrive as production and conservation systems. Peasant seed systems must be out of the scope of rules and norms aimed at the commercial seed sector and ill-suited to the nature and logic of peasant seed systems. Instead, African states shall take positive steps to ensure the protection and promotion of peasant seed systems through the development of a national policy framework on peasant seed systems and biodiversity. An important step in this direction is the "Proposed legal framework for the recognition and promotion

of farmer managed seed systems (FMSS) and the protection of biodiversity" developed by the Alliance for Food Sovereignty in Africa (AFSA).²⁷⁷ Such a framework shall result from consultation between the government, peasants' organizations and communities, public research institutions and other relevant actors.²⁷⁸ Any existing or upcoming seed-related legislation shall recognize and support the role played by peasants in conserving and enhancing agrobiodiversity.

D. OBLIGATIONS TO PROTECT TRADITIONAL KNOWLEDGE, INNOVATION AND PRACTICES, AND TO ENSURE EQUITABLE BENEFIT SHARING

Pursuant to their obligation to protect peasants' right to traditional knowledge, innovation and practices, African states need to fully recognize the existence of such knowledge in the hands of peasants. The preservation and promotion of traditional agricultural techniques and innovations, including seed handling practices, shall be fully integrated in African laws and policies. Such recognition needs to translate into measures that ensure that peasants and local communities are involved, that their prior informed consent has been obtained before accessing genetic resources and associated traditional knowledge, and that benefit sharing modalities are prescribed on mutually agreed terms.

E. OBLIGATION TO ENSURE PEASANTS' PARTICIPATION IN DECISION-MAKING PROCESSES IN RELATION TO SEEDS

Actions shall be taken to raise opportunities for peasants and their organizations, and to enhance their capacity, to participate in decision-making processes in matters pertaining to seeds, including in the elaboration, interpretation and application of international agreements and standards, and of national and regional laws and policies. This requires addressing the imbalance in representation between peasants, and industry representatives and other civil society actors.

F. OBLIGATION TO ENSURE THAT AGRICULTURAL RESEARCH AND DEVELOPMENT INTEGRATES THE NEEDS OF PEASANTS, WITH THEIR ACTIVE PARTICIPATION

The AU and African states shall ensure that agricultural research and development integrates the needs of peasants, by dedicating specific and consequential funding streams to research and development of neglected and underutilized crops, local varieties and seeds that respond to the needs of peasants. National authorities shall ensure and strengthen peasants' active participation in the definition of priorities

²⁷⁷ AFSA, "Proposed legal framework."

²⁷⁸ AFSA, "Proposed legal framework," 10.

and the undertaking of research and development of local crops, and neglected and underutilized crops, taking into account their experience in such research and development. They shall encourage equitable and participatory peasant-scientist partnerships, such as peasant field schools and participatory plant breeding.

6. CONCLUSION

For too long, peasant seed systems have been neglected and marginalized by laws, regulations and public policies geared toward the needs and interests of the corporate sector.

The adoption of UNDROP by the UN General Assembly is a powerful reminder that the human rights to seeds and food must prevail over intellectual property and seed marketing laws and regulations. The Declaration provides a much-needed impetus to rebalance legal regimes governing seeds and plant genetic resources so as to fully implement peasants' rights. Peasants' rights and peasant seed systems go hand in hand, and are essential to building resilient food and agricultural systems that can adapt to a changing climate.

The model laws developed by the AU represented a unique contribution to the development of comprehensive legislation integrating biosafety and the rights of peasants, farmers and local communities. Unfortunately, in the past two decades, the model laws were largely sidestepped as African countries adopted increasingly stringent IP regimes and seed marketing laws. A first and essential step toward the realization of peasants' right to seeds is to reverse this trend, and prioritize laws and policies that support and strengthen peasant seed systems.

The comprehensive and inalienable nature of the rights enshrined in UNDROP, which encompass numerous policy fields and require the adoption of a systemic and holistic approach to law-making, makes it a powerful tool to better protect peasants' right to seeds and peasant seed systems in Africa – not only in the interest of peasants and farmers, but of society at large.

ANNEX: RELEVANT ARTICLES OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS

ARTICLE 1

1. For the purposes of the present declaration, a peasant is any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land.
2. The present declaration applies to any person engaged in artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area. It also applies to dependent family members of peasants.
3. The present declaration also applies to indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities, and the landless, engaged in the above-mentioned activities.
4. The present declaration further applies to hired workers, including all migrant workers, regardless of their migration status, and seasonal workers, on plantations, agricultural farms, forests and farms in aquaculture and in agro-industrial enterprises.

ARTICLE 2

1. States shall respect, protect and fulfil the rights of peasants and other people working in rural areas. They shall promptly take legislative, administrative and other appropriate steps to achieve progressively the full realization of the rights of the present declaration that cannot be immediately guaranteed.

...

3. Without disregarding specific legislation on indigenous peoples, before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect the rights of peasants and other people working in rural areas, States shall consult and cooperate in good faith with peasants and other people working in rural areas through their own representative institutions, engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.
4. States shall elaborate, interpret and apply relevant international agreements and standards to which they are party, in a manner consistent with their human rights obligations as they apply to peasants and other people working in rural areas.
5. States shall take all necessary measures to ensure that non-State actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the rights of peasants and other people working in rural areas.
6. States, recognizing the importance of international cooperation in support of national efforts for the realization of the purposes and objectives of the present Declaration, shall take appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of peasants and other people working in rural areas, among others. Such measures could include:
 - (a) Ensuring that relevant international cooperation, including international development programmes, is inclusive, accessible and pertinent to peasants and other people working in rural areas;
 - (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
 - (c) Facilitating cooperation in research and in access to scientific and technical knowledge;
 - (d) Providing, as appropriate, technical and economic assistance, facilitating access to and sharing of accessible technologies, and through the transfer of technologies, particularly to developing countries, on mutually agreed terms;
 - (e) Improving the functioning of markets at the global level and facilitating timely access to market information, including on food reserves, in order to help to limit extreme food price volatility and the attractiveness of speculation.

ARTICLE 4

1. States shall take all appropriate measures to eliminate all forms of discrimination against peasant women and other women working in rural areas and to promote their empowerment in order to ensure, on the basis of equality between men and women, that they fully and equally enjoy all human rights and fundamental freedoms and that they are able to freely pursue, participate in and benefit from rural economic, social, political and cultural development.
2. States shall ensure that peasant women and other women working in rural areas enjoy without discrimination all the human rights and fundamental freedoms set out in the present Declaration and in other international human rights instruments, including the rights:
 - (a) To participate equally and effectively in the formulation and implementation of development planning at all levels; ...
 - (d) To receive all types of training and education, whether formal or non-formal, including training and education relating to functional literacy, and to benefit from all community and extension services in order to increase their technical proficiency;
 - (e) To organize self-help groups, associations and cooperatives in order to obtain equal access to economic opportunities through employment or self-employment;
 - (f) To participate in all community activities;
 - (g) To have equal access to financial services, agricultural credit and loans, marketing facilities and appropriate technology ...

ARTICLE 10

1. Peasants and other people working in rural areas have the right to active and free participation, directly and/or through their representative organizations, in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods.
2. States shall promote the participation, directly and/or through their representative organizations, of peasants and other people working in rural areas in decision-making processes that may affect their lives, land and livelihoods; this includes respecting the establishment and growth of strong and independent organizations of peasants and other people working in rural areas and promoting their participation in the preparation and implementation of food safety, labour and environmental standards that may affect them.

ARTICLE 11

1. Peasants and other people working in rural areas have the right to seek, receive, develop and impart information, including information about factors that may affect the production, processing, marketing and distribution of their products.
2. States shall adopt appropriate measures to ensure that peasants and other people working in rural areas have access to relevant transparent, timely and adequate information in a language and form and through means adequate to their cultural methods so as to promote their empowerment and to ensure their effective participation in decision-making in matters that may affect their lives, land and livelihoods.
3. States shall take appropriate measures to promote the access of peasants and other people working in rural areas to a fair, impartial and appropriate system of evaluation and certification of the quality of their products at the local, national and international levels, and to promote their participation in its formulation.

ARTICLE 15

...

4. Peasants and other people working in rural areas have the right to determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty. This includes the right to participate in decision-making processes on food and agriculture policy and the right to healthy and adequate food produced through ecologically sound and sustainable methods that respect their cultures.
5. States shall formulate, in partnership with peasants and other people working in rural areas, public policies at the local, national, regional and international levels to advance and protect the right to adequate food, food security and food sovereignty and sustainable and equitable food systems that promote and protect the rights contained in the present declaration. States shall establish mechanisms to ensure the coherence of their agricultural, economic, social, cultural and development policies with the realization of the rights contained in this Declaration.

ARTICLE 19

1. Peasants and other people working in rural areas have the right to seeds ..., including:
 - (a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;

- (b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture;
 - (c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture;
 - (d) The right to save, use, exchange and sell their farm-saved seed or propagating material.
2. Peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge.
 3. States shall take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas.
 4. States shall ensure that seeds of sufficient quality and quantity are available to peasants at the most suitable time for planting, and at an affordable price.
 5. States shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow.
 6. States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity.
 7. States shall take appropriate measures in order to ensure that agricultural research and development integrates the needs of peasants and other people working in rural areas; they shall take appropriate measures in order to ensure their active participation in the definition of priorities and the undertaking of research and development, take into account their experience, and increase investment into research and development of orphan crops and seeds that respond to the needs of peasants and other people working in rural areas.
 8. States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.

ARTICLE 20

1. States shall take appropriate measures, in line with relevant international obligations, to prevent the depletion and ensure the conservation and sustainable use of biodiversity, in order to promote and protect the full enjoyment of the rights of peasants and other people working in rural areas.
2. States shall take appropriate measures in order to promote and protect the traditional knowledge, innovation and practices of peasants and other people

working in rural areas, including traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity.

3. States shall prevent risks of violation of the rights of peasants and other people working in rural areas arising from the development, handling, transport, use, transfer or release of any living modified organisms.

ARTICLE 25

...

3. States shall encourage equitable and participatory farmer-scientist partnerships, such as farmer field schools, participatory plant breeding, and plant and animal health clinics to respond more appropriately to the immediate and emerging challenges that peasants and other people working in rural areas face.

...

ARTICLE 26

1. Peasants and other people working in rural areas have the right to enjoy their own culture and to pursue freely their cultural development, without interference or any form of discrimination. They also have the right to maintain, express, control, protect and develop their traditional and local knowledge, such as ways of life, methods of production or technology, or customs and tradition. No one may invoke cultural rights to infringe upon the human rights guaranteed by international law or to limit their scope.

...

3. States shall respect, and take measures to recognize and protect, the rights of peasants and other people working in rural areas relating to their traditional knowledge, and eliminate discrimination against the traditional knowledge, practices and technologies of peasants and other people working in rural areas.

ARTICLE 27

1. The specialized agencies, funds and programmes of the United Nations system, and other intergovernmental organizations, including international and regional financial organizations, shall contribute to the full realization of the present Declaration, including through the mobilization of, inter alia, development assistance and cooperation. Ways and means of ensuring the participation of peasants and other people working in rural areas on issues affecting them shall be considered.

2. The United Nations and its specialized agencies, funds and programmes, and other intergovernmental organizations, including international and regional financial organizations, shall promote respect for and the full application of the present Declaration, and follow up on its effectiveness.

ARTICLE 28

1. Nothing in the present Declaration may be construed as diminishing, impairing or nullifying the rights that peasants and other people working in rural areas and indigenous peoples currently have or may acquire in the future.
2. The human rights and fundamental freedoms of all, without discrimination of any kind, shall be respected in the exercise of the rights enunciated in the present Declaration. The exercise of the rights set forth in the present Declaration shall be subject only to such limitations as are determined by law and that are compliant with international human rights obligations. Any such limitations shall be non-discriminatory and necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and for meeting the just and most compelling requirements of a democratic society.

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